

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BERNIE CLEMENS and NICOLE:
CLEMENS

vs

13-CV-2447

NEW YORK CENTRAL MUTUAL
FIRE INSURANCE COMPANY

BEFORE: THE HONORABLE MALACHY E. MANNION

PLACE: COURTROOM NO. 3

PROCEEDINGS: JURY TRIAL

DATE: FRIDAY, NOVEMBER 6, 2015

APPEARANCES:

For the Plaintiffs:

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1 THE COURT: I want to talk about the request by the
2 defense under that Superior Court case for removal of the
3 language related to heightened. Then do you have some other
4 question about the --

5 MS. ALBRIGHT: On the separate charge for the opinion
6 evidence on expert witness, Your Honor.

7 THE COURT: Okay.

8 MS. ALBRIGHT: The reading of the same, Your Honor,
9 when we read through the first paragraph --

10 THE COURT: What page is that?

11 MS. ALBRIGHT: Seventeen, Your Honor.

12 THE COURT: Okay.

13 MS. ALBRIGHT: The second sentence says a so-called
14 expert witness. So-called expert, Your Honor, the connotation
15 that is with so-called and reading 4.08 opinion evidence, the
16 suggested instruction doesn't have so-called within the
17 definition of the actual witness itself as far as the
18 designation of the same. We will ask respectfully if we can
19 remove so-called from the instruction.

20 THE COURT: What else?

21 MS. ALBRIGHT: The second part, Your Honor, if we
22 read 408 from the jury instruction, it pertains to the second
23 full paragraph --

24 THE COURT: You're talking about the Pennsylvania
25 standard jury instructions?

1 MS. ALBRIGHT: The actual -- it's from the federal
2 instructions, Your Honor, that was pulled --

3 THE COURT: Third Circuit or the --

4 MS. ALBRIGHT: Third Circuit, Your Honor, yeah.

5 THE COURT: Let me get those.

6 MS. ALBRIGHT: Thank you, Your Honor. I believe the
7 same that was utilized in the drafting of the --

8 THE COURT: Now, you said four point --

9 MS. ALBRIGHT: 08. I have it listed as the Third
10 Circuit.

11 THE COURT: I don't have 4.08 in the Third Circuit.

12 MS. ALBRIGHT: Then it would have been the regular
13 federal instructions, Your Honor. I apologize I said -- I have
14 the copy of the instruction printed out here, Your Honor.

15 THE COURT: Tell me what your objection is, some
16 substance so I can understand it first. Then I will go look
17 for it.

18 MS. ALBRIGHT: Just if we can add the additional
19 language from the proposed instruction that says in weighing
20 this opinion testimony, you may consider the witness'
21 qualifications, reasons for the witness' opinions, reliability
22 upon the information supporting the witness' opinion as well as
23 other factors discussed in these instructions for the weighing
24 of the testimony of the witnesses.

25 THE COURT: Standard federal --

1 MS. ALBRIGHT: Would you like to take it with you?

2 THE COURT: No. Is there a citing at the bottom of
3 it on the page?

4 MS. ALBRIGHT: O'Malley Federal Rules of Evidence
5 703. It's going to the comments, Your Honor. It's under the
6 comment section. It doesn't have the actual citation attached
7 to it, no. I apologize, Your Honor.

8 THE COURT: I have O'Malley, the Federal Jury
9 Instructions. There's no 4.08. So I am not sure what that is
10 referring to.

11 MS. ALBRIGHT: Permission to approach, Your Honor.

12 THE COURT: Sure. It isn't exactly word for word,
13 but it seems to be a paraphrase of what we have. Do you have
14 an objection to that?

15 MR. KASTER: I'm fine with it, whatever they want to
16 put in.

17 THE COURT: We can add that paragraph. The so-called
18 -- which is what we have always used -- yeah, I am not going to
19 remove that. I don't find it to be derogatory at all. I find
20 it to be a modifier that lets them know someone who is
21 so-called an expert can do certain things. So I am not -- I am
22 not reading it the same way you're reading it. But it is meant
23 to clearly identify to the jury that this is somebody different
24 than everybody else and they have to consider it different than
25 anybody else. The so-called I will leave. I think that makes

1 perfect sense. We will add this paragraph to page 17 which
2 will kick everything to a different page. So we will make new
3 copies of that. That takes care of your objections, okay.

4 Your request for the removal of the language that
5 says heightened standard, I read the case that you had
6 indicated to me. I'm going to leave it the way that I
7 presently have it because as I said, your case is not a binding
8 case. It's a 2006 case.

9 The Pennsylvania Standard Jury Instructions were
10 amended in 2009 related to the -- that particular provision or
11 that particular charge. No change was made based upon that
12 case. And the most recent revisions are 2015. So in the
13 ensuing nine years that Superior Court case has not caused any
14 change in the suggested Pennsylvania instructions. I don't
15 find it to be persuasive.

16 MR. KASTER: My objection is preserved?

17 THE COURT: Absolutely.

18 MR. KASTER: Thank you.

19 THE COURT: We will make that change. In the
20 meantime, ready to go?

21 MR. PISANCHYN: Yes, Your Honor.

22 THE COURT: Okay. All right. Mr. Catalano, you can
23 come back up on the stand. Bring the jury out.

24 (The jury entered the courtroom at this time.)

25 THE COURT: Mr. Catalano, you're reminded you're

1 still under oath.

2 DIRECT EXAMINATION (cont'd.)

3 BY MR. KASTER:

4 Q. Good morning, Joe.

5 A. Good morning.

6 Q. We left off on that April 28th, 2014 letter from my office
7 requesting employment, income information. Pat, pull up
8 exhibit 48, please. Can you highlight the date, please? I'm
9 showing you, Joe, a letter of April 30th, 2014. Pull up the
10 third paragraph, please. Can you highlight that first sentence
11 for us? According to this letter, what are we asking for?

12 A. Continued responses to our discovery.

13 Q. Including what? What does it say?

14 A. In the meantime if you'd like to provide meaningful
15 discovery responses, including whatever information you may
16 have to support your income loss, slash, earnings capacity
17 claim, as well as any information supporting your specific
18 allegations against my client, I would be glad to move forward
19 with your client's statements and depositions.

20 Q. Pull up exhibit 52, Pat. That was April 30th, 2014.
21 We're still requesting the information that was requested all
22 the way back. We saw a letter yesterday September 20th, 2011.

23 A. Yes.

24 Q. Now, I am going to show you a June 16, 2014 letter. Pat,
25 pull up the second paragraph, please. Who is this from to?

1 A. This is a letter from the Pisanchyn law firm directed to
2 Charles Haddick and Bryon Kaster of the law firm of Dickey
3 McCamey.

4 Q. Okay. Pull up the first and second paragraph, Pat.
5 According to this letter, what is plaintiff's counsel providing
6 to us?

7 A. I'm pleased to enclose supplementary discovery responses
8 regarding the aforementioned matter. Enclosed herein please
9 find the W. 2 information for Mr. Bernie Clemens for 2004
10 through 2013 which completes defendant's request for production
11 of documents.

12 Q. June 16, 2014 we were finally provided with the
13 information that was requested?

14 A. That's correct.

15 Q. Pull up the timeline, please. April 26, 2013 plaintiff
16 filed this lawsuit including this bad faith claim comprised of
17 the allegations you heard here today -- or this week. After
18 that, formalities of the Court, did we send -- we sent
19 discovery requests to plaintiff, correct?

20 A. Yes.

21 Q. You talked about those earlier. Those were the
22 interrogatories, request for production of documents that are
23 part -- once a lawsuit is filed that's one of the ways to
24 request things. Is that your understanding?

25 A. That's the normal discovery process.

1 Q. Pat, pull up exhibit 15, please. These are if -- if you
2 can highlight -- these are the interrogatories we saw
3 yesterday. There's a lot of questions that we were asking.
4 That's what you testified to yesterday. So those are those.
5 Pull up exhibit 57, please.

6 These are the request for production of documents that we
7 asked -- we showed you yesterday. Pull up exhibit 58, please.
8 These are the interrogatories request for production of
9 documents the plaintiff set two. We saw these yesterday.
10 These are the three requests that were sent out, correct?

11 A. Yes, they are.

12 Q. Pat, pull up exhibit 54, please. Pull up the text. We
13 heard early in trial testimony about an order of Court dated
14 June 4th, 2014 of Judge Conaboy of this very court requiring
15 plaintiff's -- requiring plaintiff to produce responses to
16 those discovery requests. Is that what we're looking at here?

17 A. Yes, it is.

18 Q. June 4, 2014 the Court had to order plaintiff to produce
19 documents that were sent as part of their lawsuit on November
20 11, 2013, correct?

21 A. That's correct.

22 Q. We went through some of those requests yesterday, and it
23 included medical expenses, out-of-pocket expenses, tax returns,
24 any information they have regarding their wage loss claim,
25 correct?

1 A. Yes.

2 Q. Were there other things requested, too?

3 A. Yes.

4 Q. So as of June 4, 2014 the Court ordered plaintiff to
5 produce those documents?

6 A. The Court was ordering them to produce them, yes, at that
7 point in time.

8 Q. Pull up D. 647, please. Can you also pull up D. 648 and
9 put them next to each other? Pull up the paragraph at the top
10 of the page, please. It's just a continuation on the next
11 page. I just want to show everyone the entire paragraph. Jim,
12 can you -- Joe, can you read the first two sentences of the
13 Court's opinion?

14 A. The interrogatories and production requests to which the
15 defendant New York Central seeks to compel answers are with one
16 exception straightforward, unremarkable and obviously relevant.
17 Plaintiffs would be required to respond to these requests even
18 in the ordinary course of events.

19 Q. Thank you. On D. 649 pull up the footnote at the bottom
20 of the page. In fairness there was one exception, correct,
21 that we were -- they were not required to produce, right?

22 A. That's what it states, yes.

23 Q. I will pull that up in fairness to everybody. We need to
24 know what that is.

25 A. The exception is the production request concerning tax

1 information sets the relevant time period as tax years 2004
2 through 2013. The Court believes this is a reasonable time
3 frame to establish such wage loss as Bernie Clemens has
4 experienced. Thus Bernie Clemens must provide W. 2 forms or
5 such alternative documentation as may be responsive for the
6 ten-year period from 2004 through 2013.

7 Q. So the Court didn't require them to turn over the tax
8 returns, right?

9 A. No, just the W. 2s.

10 Q. Those discovery requests we looked at, those letters, we
11 were only asking for tax returns?

12 A. No, we requested any information that would help document
13 their wage loss claim.

14 Q. Those letters spelled out very clearly or whatever
15 information. We looked at all those letters, right?

16 A. Yes, we did.

17 Q. We looked at the discovery requests. That's not all we
18 were asking for was tax returns?

19 A. It was not.

20 Q. Anything in the judge's order, anything he may have?

21 A. We were looking for any confirmation of a wage loss claim.

22 Q. If you can pull up the next exhibit, Pat. That's exhibit
23 63. We just saw the cover letter. This is the June 16th, 2014
24 supplemental discovery provided by the plaintiff pursuant to
25 that Court order. If you could turn to page D. 622, please.

1 You see here is the W. 2 information, and there's several pages
2 of it. That's what was provided, ten years in there of that.
3 If you can just put D. 615, D. 616 next to each other. They
4 are requesting information -- we requested a lot of stuff, and
5 the Court's opinion addressed more than that, correct?

6 A. Yes.

7 Q. I am showing you the discovery responses. You can see
8 there was a lot more they had to provide answers to. You can
9 see it. Take a second and allow -- those are the answers we
10 were finally able to get. Pull up the next two pages, Pat.
11 Their answers are in bold, so you can see there's stuff written
12 down.

13 The questions are in kind of normal font, right, answers
14 -- you see there are even more answers coming. I think -- is
15 that 617 and 618? Pull up 619 and 620 and do the same thing,
16 Pat. You can see discovery answers that were provided.
17 6/16/2014, first request -- on November 11th, 2013 and March
18 8th, 2014 as part of this lawsuit -- plaintiff's lawsuit
19 alleging your company of bad faith, correct?

20 A. Yes.

21 Q. That's June 16, 2014. Pull up the timeline. The judge
22 has already told you -- and I believe he will instruct the jury
23 at the end of the case that we are talking a period of time
24 June 21, 2011 until June 20th, 2014. It's your understanding
25 is that period of time there was a supplementary underinsured

1 motorist claim being presented by plaintiffs, correct?

2 A. That is the time frame, yes.

3 Q. Right. It began June 21, 2011. It was resolved June
4 20th, 2014 for \$25,000, correct?

5 A. That's correct.

6 Q. A lot of letters went back and forth. But is that a fair
7 indication of what was requested in this case by New York
8 Central during that time period?

9 A. That identifies all of the numerous requests that we were
10 trying to develop the information necessary to evaluate the
11 claim.

12 Q. We heard a lot of talk in this case about some seat belt
13 defense, right?

14 A. Yes.

15 Q. Do you remember when -- did New York Central as of June
16 20th, 2014 believe they had a viable seat belt defense in this
17 case?

18 A. June 2014?

19 Q. Right.

20 A. No, absolutely not.

21 Q. I believe the testimony was -- let me ask you. When was
22 -- when did New York Central realize they didn't have a seat
23 belt defense?

24 A. I can't remember the exact date, but it was in, I believe,
25 2011.

1 Q. That's consistent with what we heard here today, I
2 believe. So in 2011, you realized it didn't apply -- no matter
3 what law applied, you determined it didn't apply, correct?

4 A. Yes.

5 Q. You were the supervisor on the claim. That was something
6 you were -- that was a decision that was made, right?

7 A. Yes.

8 Q. Why was it -- why did you decide it didn't apply?

9 A. Through the investigation and the initial investigation
10 conducted by Mr. Dvoracek.

11 Q. So regardless of what law applied you determined in 2011,
12 the seat belt defense wasn't something you had, correct?

13 A. Correct.

14 Q. You said this timeline was all the request for
15 information. Are there any requests after 2011 being made?

16 A. They can be identified on the timeline as numerous
17 requests.

18 Q. Yes. Based on that, as of 2011 when we all knew that New
19 York Central -- the seat belt defense wasn't something we can
20 pursue, was the investigation completed at that point?

21 A. Not even close to being completed.

22 Q. You still needed a lot of that information, right?

23 A. All of the information that was requested through
24 discovery with respect to damages.

25 Q. All right. Now, a lawsuit was filed on August 26, 2013

1 alleging that New York Central acted in bad faith, right?

2 A. Yes.

3 Q. You can see that on the timeline. There's a little -- I
4 don't know how it gets there, but it's there. It says bad
5 faith complaint filed. That was when that lawsuit was filed
6 alleging New York Central acted in bad faith?

7 A. Yes.

8 Q. Did you have all the information you'd been asking for
9 since 2011? Did you have all the information at the time that
10 you were -- your company was accused of acting in bad faith?

11 A. That same information we were requesting long before
12 August of 2013 -- August 26th, 2013 we requested after and was
13 only provided after the judge compelled them to.

14 Q. How many days after Mr. Clemens finally provided those
15 discovery responses in response to the Court order did this
16 claim settle?

17 A. Four days.

18 MR. KASTER: No further questions. Thank you, Joe.

19 THE COURT: You may cross-examine.

20 MR. PISANCHYN: Thank you, Your Honor.

21 CROSS EXAMINATION

22 BY MR. PISANCHYN:

23 Q. Good morning, Mr. Catalano. How are you today?

24 A. Good morning.

25 Q. So just going over a few of the things that you said was

1 -- we can agree that at the time of your deposition, which was
2 taken on June 12th, 2014, you had said that NYCM would offer
3 \$25,000 to settle this case, correct?

4 A. That's correct.

5 Q. And that was even before the wage loss information was
6 received, correct?

7 A. Yes.

8 Q. Okay. So how then -- so you agree that that was before
9 the four days that you are saying you need the information that
10 the whole reason the case settled for? What difference did
11 that information make in regards to the evaluation then if you
12 settled it for the same offer before you even got the
13 information?

14 A. You ask for all of the information. When you want -- in
15 this instance, the information that was provided had no impact
16 on the offer. We discussed throughout the course of this trial
17 that offers are to be extended at any point in time if there's
18 an opportunity to resolve the claim.

19 At the time of my deposition, there was an opportunity to
20 try and resolve the claim. The offer was extended. It just so
21 happens it was accepted four days after the receipt of those
22 records. Those records would have --

23 Q. Increased the value?

24 A. No, they wouldn't have.

25 Q. In regard to the -- you agree that examiners must begin

1 base negotiation -- examiners must begin negotiations based on
2 the medicals they have received and not continue to wait until
3 all authorizations are signed. That's one of your best
4 practices, correct?

5 A. That's exactly what occurred right there.

6 Q. Okay. So you'd agree with that?

7 A. Sure.

8 Q. Okay. You agree that the offers should be based on
9 information in the file, correct?

10 A. Correct.

11 Q. In regard to the information in the file, it was my
12 understanding there was only one, correct?

13 A. Correct.

14 Q. Okay. In regard to that information, your adjustor's
15 notes had a complete summary, correct, of the medical records?

16 A. Summary of medical records, not a complete summary of
17 medical records.

18 Q. Now, let me ask you, Mr. Kaster said in his letter -- I
19 believe it was yesterday -- in the letter that he sent out ten
20 authorizations to be signed, correct, his office -- ten blank
21 authorizations?

22 A. There were ten authorizations, yes.

23 Q. When did those -- those ten authorizations were blank?

24 A. You provided them, and they were blank, yes.

25 Q. So they are a big firm. They have a few hundred lawyers.

1 I would imagine they have copiers?

2 A. You cannot use copies of medical authorizations.

3 Q. Show me where it says that on the document on the
4 authorization. Would you agree it says no authorization cannot
5 --

6 A. You discussed how different hospitals require different
7 authorizations.

8 Q. I'm only -- does the --

9 A. You cannot use a --

10 THE COURT: Let him answer the question.

11 THE WITNESS: What you're saying is that it's
12 improper to use a copy of a medical authorization.

13 BY MR. PISANCHYN:

14 Q. In Pennsylvania? Do you know about Pennsylvania?

15 A. I believe those are federal rules, the federal HIPAA
16 compliance.

17 Q. Have you ever sent an authorization in this case that
18 someone sent back and said that they weren't going to comply
19 with it?

20 A. None that I am aware of.

21 Q. Okay. In regard to NYCM, in fact, shortly after this --
22 in fact, the day after this incident, they began to send
23 letters to the providers, correct, requesting medical records?

24 A. In support of your client's no fault claim.

25 Q. Weis Pharmacy, correct?

1 A. Yeah -- yes, sir.

2 Q. Weis again, Weis, Weis Pharmacy again, they were sending
3 -- they were based on the authorizations that they had of
4 9/25/2009, correct? They actually even sent a letter to Bernie
5 Clemens' employer requesting all and any information, correct?

6 A. Yes.

7 Q. And you also said that you needed bills, right? Is that
8 correct, bills --

9 A. Any bills, yes.

10 Q. And you agree that NYCM would have the bills because you
11 said that they were paying them, correct, and they were
12 requesting the bills from Northeast Rehab?

13 A. Requested -- and through the litigation we were requesting
14 any and all bills that were out of pocket, not bills that were
15 paid by New York Central Mutual's no-fault claim.

16 Q. Looking at the letter of Kirsch that you said that he was
17 requesting from the Clemens certain records dated September 20,
18 2011.

19 A. What are we looking at?

20 Q. Attorney Kirsch's letter of September 20th, 2011 where
21 he's requesting -- he's requesting authorizations to be signed
22 that he didn't produce for certain records.

23 A. Can I see?

24 Q. Yeah. You went over it yesterday.

25 A. I just want to make sure what I'm looking at. Is that

1 okay?

2 Q. It's more than fine.

3 A. Yes, Mr. Kirsch provides a list of ten specific
4 authorizations that he would like Mr. Clemens to provide.

5 Q. Do you know how many of those that NYCM had had and
6 already summarized? Do you want to go through it?

7 A. No, I am not sure if they had all those records.

8 Q. Would you agree that I put X.s here request No. 1, three,
9 four, five, six, seven, eight, nine and ten were all signed or
10 -- not all signed -- but you had those records already? Do you
11 want to --

12 A. They were provided under the no-fault claim, yes.

13 Q. And they were summarized in your casualty adjustor's
14 claims notes, correct?

15 A. That were provided through your discovery demand package
16 in 2011.

17 Q. Now, in regard to this discovery dispute that you -- that
18 you say took some time, NYCM insurance wanted to get joint tax
19 returns, correct, from both Mr. and Mrs. Clemens, correct?

20 A. We were requesting tax returns because of the lost wage,
21 yes.

22 Q. We are saying our clients -- Ms. Clemens had a privacy
23 claim in that because she wasn't advancing a wage loss claim
24 and that there should not be any documents produced in regards
25 to her wages. We believed that was fair. That was the issue,

1 correct?

2 A. We asked for any and all wage loss information.

3 Q. I know you did. We said it wasn't appropriate, your
4 request, based on the privacy interests of Mrs. Clemens because
5 she wasn't making a wage loss claim and we believed that it was
6 another hoop or another paddy wagon that you're making the
7 insureds go through in order to make a claim and punish them
8 for doing it?

9 A. No hoops or paddy wagon. The Court compelled you to
10 provide wage loss information for Mr. Clemens and said he
11 didn't have to provide them for Mrs. Clemens.

12 Q. Right.

13 A. Prior to that you could -- had the opportunity to provide
14 wage loss information for Mr. Clemens.

15 Q. Prior to that --

16 A. -- if there was a distinction.

17 Q. Prior to that, sir --

18 A. So all that period of time we did not have wage loss
19 information to complete an evaluation.

20 Q. You worked for a plaintiff's firm before, correct?

21 A. I did.

22 Q. And you know yourself that the defendants or the
23 plaintiffs can if they choose once litigation ensues subpoena
24 any little record or as much records as they wish after the
25 suit is filed, correct?

1 A. I am not sure of the rules of discovery on that.

2 Q. So you're telling me you don't know as a litigation
3 supervisor whether or not when a case goes into litigation that
4 you can subpoena any record that you want and the Court will
5 issue a subpoena to whoever you want to say, produce that
6 document by this time?

7 A. As I'm not an attorney, I'm not aware of how to secure all
8 these through the Court system. That's why we hired attorneys
9 like we started with Mr. Kirsch back in 2011 to help us in this
10 process.

11 Q. You're telling me for how many years you've been an
12 adjuster you never asked an attorney if you could just subpoena
13 the records from any little -- anyplace you choose and that
14 they have to produce them as per a judge signing a subpoena or
15 a court officer signing a subpoena saying, give us these
16 documents within 30 days. Instead of doing that, sir, you
17 requested the Clemens instead to go to try to chase down this
18 information when you -- NYCM had the opportunity to do it
19 themselves, correct?

20 A. The normal course of discovery as I understand it, is that
21 you make discovery demands, they are generally complied with by
22 the plaintiff. If they are not complied with by the plaintiff,
23 then, in fact, I believe one of the alternatives for that
24 discovery process to move forward is for the courts to either
25 -- one, you file a motion to compel to force them to provide

1 it. Or another alternative in lieu of that, I believe, is to
2 seek a subpoena for the production of those documents.

3 Q. So here's --

4 A. So your client would not have been providing them
5 voluntarily. In light of that, that would be in violation of
6 the policy conditions which says they must help us provide to
7 develop that information from which to evaluate their claim.

8 Q. Show me where in your policy it says that the plaintiff
9 has to go to the I. R. S. and request records, have to go here
10 and collect records, have to do this, have to do that. It says
11 they have to sign authorizations. If you sent authorizations,
12 they would have been signed for tax returns. Instead NYCM sent
13 an authorization and demanded that joint tax returns be sent;
14 isn't that true?

15 A. We asked for any and all documentation of a wage loss, not
16 solely W. 2 forms. So your client, I believe, would have a
17 paycheck. That would be a -- one means of verifying his lost
18 wages. That could have very easily have been provided by your
19 office to us to help us assist in the evaluation of this claim.
20 Those were never provided.

21 Q. Now, in regard to the statement under oath, it was alleged
22 that it was unilaterally scheduled, I believe, by your defense
23 counsel here, correct?

24 A. I believe the letter stated that based on your request to
25 unilaterally set that time frame they would do so.

1 Q. Right. And then there was a letter sent March 12th, if
2 you can read this from the Pisanchyn Law Firm. It's 899 --
3 Bates -- 899 but it doesn't need to be an exhibit. I'm just
4 referencing it for the stenographer. Would you agree that that
5 letter basically said that the attorney had a scheduling
6 conflict and respectfully requested that it be rescheduled.
7 It's just right where the arrow is. So there was a scheduling
8 conflict because it was unilaterally --

9 THE COURT: Hold on. Let him answer. Then you can
10 ask the next question.

11 THE WITNESS: The question is again?

12 BY MR. PISANCHYN:

13 Q. That letter was written back and said attorney Kaster
14 unilaterally scheduled the deposition, we have a scheduling
15 conflict, we have to be somewhere in court on that date and,
16 therefore, Ms. Albright sent the letter out asking for it to be
17 rescheduled?

18 A. If we go back, Mr. Kaster originally requested dates from
19 you. So Mr. Kaster requested dates to schedule an examination
20 under oath, which would have possibly -- this scheduling
21 conflict could have been possibly -- the one you're referencing
22 in this letter could have been avoided if you told Mr. Kaster
23 that indeed you had dates you couldn't work with so that then
24 when he unilaterally set that date to hold the deposition, it
25 wouldn't have conflicted with your schedule. But you had him

1 -- you asked him -- you told him to unilaterally schedule it.

2 Q. All I'm asking, does that letter say there was a
3 scheduling conflict for that day, yes or no?

4 A. Yes, it does.

5 Q. Now, the next date that the -- it was scheduled for was
6 4/14/2014. Do you understand that? That's what Mr. Kaster
7 told you?

8 A. Yes.

9 Q. Okay. And on that date, Mr. Kaster cancelled that -- that
10 statement under oath, correct?

11 A. I'm unaware of that.

12 Q. I don't know if this one is it. This is exhibit 136. On
13 the date that attorney Kaster picked the next date --
14 unilaterally scheduled it again, right?

15 A. I --

16 Q. That's what you said. You said that we told them
17 unilaterally scheduled them. So he unilaterally scheduled
18 them?

19 A. We were talking a completely different date.

20 Q. Just that date. Can you look at this letter?

21 A. I don't know how this -- okay. I'll look at this letter.

22 Q. Okay. Thank you. On 4/14/2014 the date that NYCM
23 insurance schedules the next examination under oath, who
24 cancels it?

25 A. Because you still not provided discovery responses and

1 because we have not yet received a ruling on the pending motion
2 to compel, I am constrained to cancel the examining depositions
3 we have scheduled for April 24th.

4 Q. That's made a big issue we couldn't it because of a
5 scheduling conflict on 3/17. Yet on 4/14 2014, a month later
6 you schedule an examination under oath. We let our clients
7 know. They then take off work. All of a sudden at the last
8 minute NYCM insurance sends us a letter saying they are
9 canceling. We will put a line through that since NYCM
10 cancelled.

11 MR. KASTER: Objection, Your Honor.

12 THE COURT: All the facts that were in the question
13 are stricken from the record. You are not to consider whether
14 they took off work. There's no testimony or evidence about
15 that, okay. You can ask a question about the dates. Please
16 don't incorporate things that are not in evidence in the case.

17 MR. PISANCHYN: Sure.

18 THE COURT: Thanks.

19 BY MR. PISANCHYN:

20 Q. You agree that according to this letter on 4/14 NYCM said
21 they were cancelling it, correct?

22 A. Correct.

23 Q. And the same reason they were cancelling on 4/14 would
24 have been the same reasoning we were cancelling it on 3/17/2014
25 other than a letter trying to bring it in front of this jury

1 that it was the plaintiff's fault for this delay, correct?

2 A. No.

3 Q. You agree that the plaintiffs they don't get any benefit
4 for waiting to get 25,000? In other words, if they can get
5 25,000 four years ago, it would have been beneficial for them
6 to get it then as opposed to waiting four years, correct?

7 A. Obviously.

8 Q. Right. You also understand that the plaintiff's attorney
9 work on a contingent fee basis, correct?

10 MR. KASTER: Objection, Your Honor.

11 THE COURT: Please, please, that's -- I don't know
12 what that -- whether that's correct or incorrect or what other
13 provisions are. That's not evidence in a case about that. So
14 don't ask that -- that's stricken from the record. It's not to
15 be considered by you.

16 MR. PISANCHYN: Your Honor, may I --

17 THE COURT: Yeah, you can approach for sure.

18 MR. PISANCHYN: Thank you.

19 (The following discussion took place at sidebar:)

20 MR. PISANCHYN: He said he worked for a plaintiff's
21 firm.

22 THE COURT: Doesn't make difference. Your free --
23 whatever your fee agreement concerning your expenses, you told
24 us -- I heard times in arguments that they have to pay \$10,000
25 toward expenses for you. When you talked about a \$50,000,

1 they've paid \$10,000. I don't know what your agreement is or
2 what your arrangement is. All right. You can ask about
3 questions, all right. We will not be getting into what you
4 want to tell us your fee agreement is.

5 MR. PISANCHYN: All I was asking him, Your Honor, he
6 was --

7 THE COURT: Inappropriate question. It's stricken
8 from the record. Move on to subject matter.

9 MR. PISANCHYN: Basically this gentleman worked in
10 the industry, worked for plaintiffs. I was asking him what the
11 standard agreement is not in regard to percentages but merely
12 about -- this goes directly to what they are saying the reason
13 for the delay. Plaintiff's counsel would have no reason to
14 make any delay in this case, Your Honor. Neither would the
15 plaintiffs. It goes to the motive and who had the motive to
16 delay the case, and that's an issue.

17 THE COURT: Okay. That's -- it's completely
18 inadmissible and irrelevant to the case. Move on.

19 (The discussion at sidebar concluded.)

20 THE COURT: Anything related to counsel fees or
21 anything at all related is not for the province of the jury in
22 this case in any way, shape or form. It's completely and
23 utterly improper. You're to disregard everything about that
24 and give it no consideration of any kind in this case.

25 BY MR. PISANCHYN:

1 Q. So after June 12th, 2014 when you had given your
2 deposition and said that Mr. and Mrs. Clemens -- NYCM was
3 offering Mr. and Mrs. Clemens \$25,000, would you agree that
4 that offer never changed even four days before it was finally
5 accepted by the Clemens?

6 A. No, they settled for \$25,000.

7 Q. So nothing changed?

8 A. Nothing changed.

9 Q. Even four days before nothing changed?

10 A. The information that was received didn't change anything.

11 MR. PISANCHYN: Nothing further, Your Honor.

12 THE COURT: All right. Redirect?

13 REDIRECT EXAMINATION

14 BY MR. KASTER:

15 Q. Mr. Catalano, you just testified you actually previously
16 made the offer of \$25,000 during your deposition in June 2014,
17 correct?

18 A. Yes, we made that offer.

19 Q. The plaintiff accepted it at that time?

20 A. Not on that date, no, sir.

21 Q. In fact, at any time prior to June 20, 2014 did plaintiff
22 ever in writing demand to New York Central anything other than
23 the policy limits in this case?

24 A. Never.

25 Q. The policy limits, they are actually -- they are more than

1 25,000, right?

2 A. That's correct.

3 Q. Did I they call you up and say we will take \$25,000?

4 MR. PISANCHYN: We will ask for open ended questions
5 in his direct.

6 MR. KASTER: I can rephrase, Your Honor.

7 THE COURT: The -- I'm going to sustain the
8 objection. You can rephrase.

9 BY MR. KASTER:

10 Q. Did you have any settlement discussions by telephone with
11 plaintiff or plaintiff's counsel?

12 A. No.

13 Q. I know what a hoop is. I don't know what a paddy wagon
14 is. I will limit my question to hoops. We were talking about
15 subpoenas being a hoop, right?

16 A. Yes.

17 Q. I believe you were asked can you send a subpoena in a
18 lawsuit, right?

19 A. Yes.

20 Q. Pull up the timeline, please. Lawsuit filed August 26,
21 2013. Are there any requests for this information prior to
22 August 26th, 2013?

23 A. Numerous requests.

24 Q. Were those provided?

25 A. They were never provided.

1 Q. Who jumped through a hoop here? That's argumentative. I
2 withdraw it. We talked about authorizations sent in 2009 by
3 the no-fault carrier, which is New York Central, right?

4 A. Yes.

5 Q. No-fault, that's some different claim, right?

6 A. Long before the SUM claim was filed.

7 Q. No-fault claim in 2009, if plaintiff was treating in 2011,
8 would you expect to see those records in the file?

9 A. In 2009?

10 Q. Right.

11 A. Obviously not.

12 Q. It's later, right?

13 A. Yes, sir.

14 Q. We saw a letter -- in 2010 what did they do with respect
15 to any and all authorizations?

16 A. Revoked them.

17 Q. So in 2011 -- could I get records from 2011 even if you
18 could use those authorizations that were provided in 2009?

19 A. They were revoked and prevented me from doing so.

20 MR. KASTER: That's all I have, Your Honor.

21 THE COURT: All right. Recross?

22 MR. PISANCHYN: No, Your Honor.

23 THE COURT: You may step down.

24 MR. KASTER: Defendants are completed with their
25 case.

1 THE COURT: Okay. Any rebuttal case?

2 MR. PISANCHYN: No, Your Honor.

3 THE COURT: Both sides have rested; is that correct?

4 MR. PISANCHYN: It is, Your Honor.

5 THE COURT: We are going to take a break, ladies and
6 gentlemen of the jury. Although you heard all of the evidence
7 in the case, you haven't heard the law in the case. So no
8 forming any opinions, no discussions yet about the case. We
9 will be a few minutes. Then we will come back in, and then we
10 will begin the process of I will give you instructions on the
11 law. You will then hear closing arguments from counsel.

12 Then I will give you some housekeeping instructions
13 on how you will perform your deliberations. Then you will
14 receive the case for a decision. Until you receive the case
15 for decision, no conversations or discussions about the case,
16 please.

17 (The jury left the courtroom at this time.)

18 THE COURT: Mr. Pisanchyn, the matter of attorneys
19 fees -- we talked about this in the beginning of the case -- is
20 specifically under the statute along with interest, things I
21 told you were reserved for the Court and not to be discussed in
22 front of a jury.

23 MR. PISANCHYN: Your Honor, I wasn't getting into the
24 bad faith.

25 THE COURT: You asked the witness whether or not you

1 were receiving a contingency fee in the case. That's what you
2 asked the witness.

3 MR. PISANCHYN: What I was getting at, Your Honor,
4 was the underlying case -- when I said this case, the
5 underlying case, which would make a big difference, Your Honor,
6 which goes directly to why the plaintiff or the plaintiff's
7 attorney would not delay this case.

8 THE COURT: Inappropriate.

9 MR. PISANCHYN: I apologize.

10 THE COURT: It was specifically instructed earlier
11 that that was not something for a jury to have any information
12 or knowledge about whatsoever. It's not their prerogative in
13 any way. All right. The jury instruction that you had
14 submitted -- as I said, it's not identical to ours, but it's
15 clearly where we originally found ours comes from the Third
16 Circuit model jury instructions in criminal cases.

17 The experts in criminal cases are no different than
18 the experts in civil cases. So I have added the paragraph you
19 have requested, and it's been agreed to by the parties. Here's
20 a new -- there's a new copy of it, and we will get rid of our
21 old copies. Do we now -- any additional exhibits that have not
22 been agreed to by the parties in the case?

23 MR. KASTER: Your Honor, we agreed that the exhibits
24 that we showed to the jury.

25 MR. PISANCHYN: If we didn't -- we are fine with what

1 --

2 MR. KASTER: We are good.

3 THE COURT: You will upload all the exhibits to the
4 system, okay. And then physically we will give the jurors
5 after they leave a copy of the civil charge, a copy of the
6 verdict form which you all have and then -- what else do we
7 have?

8 MR. PISANCHYN: Three exhibits, Your Honor.

9 THE COURT: We will take a break now for ten minutes
10 to let you use the facilities. We will go into the charge,
11 which I think will probably take a half an hour, 35 minutes.
12 Then we will go directly into closings, plaintiff, defendant,
13 plaintiff, rebuttal.

14 MR. PISANCHYN: Do you mind if we set up our easel
15 there now, or do you want to do it --

16 THE COURT: When you say set up --

17 MR. PISANCHYN: Put the easel over --

18 THE COURT: Don't put any documents up you will be
19 using during your closing. You can put the easel up, all
20 right. So we will take ten minutes, let everybody kind of get
21 yourselves ready, prepared and whatever. And then when I ask
22 you to come up and do your closings, you will go first. When
23 you go, you need a minute to set up anything you want, you can.
24 When you go back up, you can set up whatever you want.

25 MR. PISANCHYN: We will take our stuff down. I

1 imagine you --

2 MR. KASTER: I don't care leaving any of that up to
3 be honest.

4 (A brief recess was taken.)

5 THE COURT: All the exhibits agreed upon by the
6 parties have been uploaded. I will explain to them how they
7 will use the system in the housekeeping instructions at the
8 very end of the case. And then we will proceed from there,
9 okay. You can bring them in.

10 (The jury entered the courtroom at this time.)

11 THE COURT: You will get a copy of this when we
12 complete the case. You will be able to take it back in with
13 you. If you have questions, you can look to the charge itself.
14 I will be reading it because it's important that it's given
15 accurately. This is not something one does off the top of
16 their head. The law is to be applied exactly as it is
17 included.

18 So at the onset, I want to extend my thanks and
19 appreciation to you, members of the jury, for your
20 attentiveness and patience during this trial. Needless to say,
21 the jury system is one of the great instruments of a free
22 society. You serve here as representatives of the people
23 charged with the duty of participating in the administration of
24 justice. It's a solemn and serious duty.

25 You are expected to perform this duty without bias or

1 prejudice to any party in the case. I'm sure you understand
2 the high duty imposed upon you as citizens to consider the
3 evidence honestly, fairly and impartially and by your verdict
4 to do justice to both the plaintiff and the defendant in the
5 case. And if in this case, members of the jury, you render a
6 fair, honest and impartial verdict, then regardless of the
7 consequences, no one connected with the case or in any way
8 interested in its outcome has a right to complain because under
9 the law, all that one can expect to achieve is a fair and
10 impartial trial.

11 Now, if a fair and honest verdict is rendered by you
12 after considering all of the evidence and following the law as
13 stated by the Court, then you have performed your duty with
14 honor. Upon this basis only can justice be achieved. Now,
15 although you as the jurors are the sole judges of the facts in
16 the case, you are duty bound to follow the stated instructions
17 of the Court and to apply the law so given to you to the facts
18 as you find them from the evidence that's been presented to
19 you.

20 Now, you're not to single out any single instruction
21 as stating the law but must consider the instructions as a
22 whole. Neither are you to be concerned about the wisdom of any
23 particular rule of law regardless of any opinion you may have
24 as to what the law ought to be, it would be a violation of your
25 sworn oath as jurors to base a verdict upon any other view of

1 the law than those given to you by the Court in these
2 instructions.

3 Now, this case should be considered by you as an
4 action between persons of equal worth and holding the same or
5 similar positions in life. A company is in entitled to the
6 same fair trial at your hands as a private individual. All
7 persons including corporations stand equal before the law and
8 are to be dealt with as equals in a court of justice.

9 Now, it's the duty of attorneys on each side of the
10 case to object when the other side offers testimony or other
11 evidence which counsel believes is not properly admissible.
12 When the Court has sustained an objection, the jury must
13 disregard the question and may draw no inference whatsoever
14 from the wording of it or speculate what the answer would have
15 been if the witness was permitted to answer the question.

16 Upon allowing testimony or other evidence to be
17 introduced over the objection of counsel, the Court does not
18 unless expressly stated indicate any opinion as to -- as to
19 the weight or effect of that evidence. As stated before, the
20 jurors are the sole judges of the credibility of all witnesses
21 and the weight and the effect to be given all evidence in the
22 case.

23 Now, the evidence has been carefully reviewed and
24 fully argued by counsel, so I am satisfied that you have a
25 clear picture of the factual issues in this case. Furthermore,

1 if I make reference to any testimony during the case, it's
2 merely to illustrate a point in my instructions and is not to
3 be considered by you as indicating any more importance to that
4 evidence than any other evidence in the case.

5 Now, there are two types of evidence from which you
6 may find the truth of the facts of the case that are before
7 you, direct evidence and circumstantial evidence. Direct
8 evidence is the testimony of one who asserts actual knowledge
9 of a fact such as an eyewitness. Circumstantial evidence is
10 proof of a chain of facts and circumstances pointing to the
11 existence or the non-existence of certain facts. The law makes
12 no distinction between the weight to be given to either direct
13 or circumstantial evidence. Nor is there a greater degree of
14 certainty required of circumstantial evidence than of direct
15 evidence. You should weigh all the evidence in the case both
16 direct and circumstantial.

17 Now, a jury's verdict must be based on the credible
18 evidence, testimony and exhibits. It may not be based upon
19 speculation. Now, members of the jury, your fundamental job in
20 this case is to find and ferret out the truth. In other words,
21 what are the true facts, what actually happened here? You're
22 the sole judges of the facts, and you are also the persons that
23 have to draw whatever inferences may logically be drawn from
24 the facts as you see them.

25 Now, inferences are deductions or conclusions which

1 reason and common sense leave the jury to draw from the facts
2 which have been established in the evidence in the case. In
3 determining the truth, of course, you must consider the
4 testimony -- the testimony of the witnesses and the exhibits
5 received in evidence.

6 In doing so, again it's your recollection of the
7 testimony that governs and not the Court's, nor counsel's
8 during their closing arguments you will be hearing in a few
9 minutes. Statements of counsel in those arguments and
10 presentations are not the evidence in the case.

11 Now, the credibility of witnesses in this case is
12 entirely for you to determine. In passing on the credibility
13 or believability and correctness of the testimony given in the
14 case, you must pass on the correctness credibility of the
15 witness. The law says in determining a credibility of a
16 witness, you should consider the manner of the person
17 testifying on the stand. Did the witness appear to be an
18 honest and frank witness wanting to tell the truth and nothing
19 but the truth? You have a right to consider the reasonableness
20 of the testimony. That is, does it have the ring or the sound
21 of truth. You have the right to consider, members of the jury,
22 the opportunity of the witness to observe that about which he
23 or she has testified and whether or not it is corroborated or
24 contradicted by other testimony or other circumstances in the
25 case.

1 You have a right to consider the interest of a
2 particular witness in the outcome of the case and whether or
3 not the witness because of some interest in the parties or the
4 outcome of the case has permitted or allowed that interest to
5 color or bias his or her testimony. If there are
6 inconsistencies or corroborations in the testimony of different
7 witnesses, it's your duty to reconcile them if you can.

8 If you cannot, then you must decide who is telling
9 the truth and who is not telling the truth. You will decide
10 the weight to be given to any or all testimony in the case.
11 Now, a witness may be discredited or impeached by contradictory
12 evidence or by evidence that at other times the witness has
13 made statements which are inconsistent with the witness'
14 present testimony on the stand.

15 If you believe any witness has been impeached and
16 thus discredited, it is your exclusive province to decide or
17 give the testimony of that witness such credibility as you may
18 think it deserves. If a witness is shown knowingly to have
19 testified falsely concerning any material matter, you have a
20 right to distrust such witness' testimony and other
21 particulars.

22 You may reject all of the testimony of the witness or
23 give it such credibility as you think it deserves. Now, the
24 evidence that a witness made an earlier statement inconsistent
25 with his or her testimony at the trial may be considered by you

1 not only in your evaluation of the party's credibility but also
2 as evidence of the truth of the contents of the statement
3 bearing upon the facts in issue.

4 The weight of the evidence to prove a fact does not
5 necessarily depend on the number of witnesses who testify.
6 What is more important is how believable the witnesses were and
7 how much weight you think their testimony deserves. Now,
8 there's a great difference between factual and opinion
9 testimony. In factual testimony, the witness testifies to a
10 fact and certifies that what he or she says is true. In
11 opinion testimony, the witness only testifies to his or her
12 opinion that such a thing is true and certifies only to the
13 integrity of the witness' actual belief. The witness says he
14 or she believes their opinion to be correct, but does not
15 warrant it to be true and does not pretend that it cannot be
16 mistaken. Now, the rules of evidence normally do not permit a
17 witness to testify as to opinions or conclusions in a case. A
18 so-called expert witness is an exception to this rule. A
19 witness who by education and experience has become expert in
20 any art, science , profession or calling may be permitted to
21 state an opinion as to a matter in which he or she is versed
22 and which is material to the case and may also state the
23 reasons for such an opinion.

24 In weighing the opinion testimony, you may consider
25 the witness' qualifications, the reason for the witness'

1 opinions and the reliability of the information supporting the
2 witness' opinion as well as any other factors discussed in
3 these instructions for weighing the testimony of witnesses.

4 You should consider each expert opinion received in
5 evidence in this case and give it such weight as you believe it
6 deserves. You may reject it entirely if you conclude the
7 reasons given in support of the opinion are not sound.
8 Remember an opinion is what somebody thinks about something,
9 and that opinion may be precisely accurate or totally
10 inaccurate and yet represent the absolute honest conviction of
11 the person who expresses that opinion.

12 In general, the opinion of an expert has value only
13 when you accept the facts upon which it is based. This is true
14 whether the facts are assumed hypothetically by the expert,
15 come from the expert's personal knowledge or from some other
16 proper source or combination of these sources. Now, any
17 stipulations of fact which have been offered and received in
18 evidence constitutes an agreement by the opposing parties
19 through their attorneys that these facts may be accepted as
20 undisputed and require no further proofs and will permit no
21 contradictory evidence.

22 They are to be accepted by you as binding and
23 conclusive for purposes of this trial. Now, the rules of
24 evidence permit the judge to accept facts that cannot be
25 reasonably disputed. This is called judicial notice. You must

1 accept -- you must accept facts given judicial notice as true
2 for purposes of this case.

3 Now, we're going to talk -- they are what I call the
4 general instructions to a jury that occur in virtually every
5 case. Now we are going to talk more particularly about the
6 substantive law in this particular case.

7 Now, under the law in most civil cases, the plaintiff
8 has the burden of proving a claim by a legal standard that's
9 called a preponderance of the evidence. Sometimes that
10 describes as if you put the evidence on both sides of the
11 scale, it must tip ever so slightly in favor of the party that
12 has the burden, the plaintiff, for them to prevail on their
13 case.

14 Now, preponderance of the evidence means a fact is
15 more likely true than not true. In this case, however, the
16 plaintiff must prove his bad faith claim by a different and
17 higher burden of proof. The plaintiff must prove his claim by
18 clear and convincing evidence. Clear and convincing evidence
19 means evidence that is so clear, direct and substantial that
20 you are convinced without hesitation that a fact is true.

21 Although this is a significant burden of proof, it
22 does not mean the plaintiff must prove the facts at issue
23 beyond a reasonable doubt or beyond all doubt. Now, the
24 plaintiff asserts a claim in this case for what is known as
25 insurance bad faith.

1 Under the law an insurance company must act with the
2 utmost good faith and fair dealing towards its insured and give
3 the interest of its insured the same faithful consideration
4 that it gives its own interest. This heightened duty arises
5 because of the special relationship between an insurer and an
6 insured and the nature of the insurance contract.

7 An insurance company acts in bad faith if it does not
8 have a reasonable basis for what it does, knows or recklessly
9 disregards its lack of a reasonable basis. Put another way,
10 bad faith occurs if an insurer otherwise knowingly and
11 recklessly acts without a reasonable basis in handling an
12 insured's claim. An insurance company acts recklessly if it
13 acts with conscious disregard or deliberate indifference to the
14 rights of its insured.

15 In deciding whether or not an insurance company acted
16 in bad faith toward its insured, you consider all of the
17 company's actions including its investigation of the claim. If
18 you find the defendant knowingly and recklessly acted without a
19 reasonable basis, your verdict must be for the plaintiff.

20 Now, the relevant time frame for establishing the
21 plaintiff's bad faith claim is from June 21, 2011 when the
22 plaintiff first notified the defendant of the claim, that's the
23 SUM claim, through June 20th, 2014, when the plaintiff's
24 insurance claim was resolved. Therefore, in determining
25 whether the defendant acted in bad faith, you may rely only --

1 you may only consider the defendant's conduct between June 21,
2 2011 and June 20th, 2014. Now, I know you heard other
3 information, and I have allowed information before that time to
4 set up basically an understanding and background of what the
5 case was and what the case was about.

6 But the relevant time period for purposes of
7 determining whether the activities were in good faith or bad
8 faith are between June 21st, 2011 to June 20th, 2014. Now, the
9 insurance company in this case -- the insurance policy in this
10 case imposes a duty of good faith and fair dealing upon both
11 the defendant and the plaintiffs.

12 Accordingly, because the parties are disputing a
13 claim under the insurance policy, both parties were required to
14 act in good faith toward each other by abiding by the
15 obligations set forth in the insurance policy and cooperating
16 in the investigation of the claim.

17 Now, I'm going to talk to you about damages in the
18 case. The fact that I'm instructing you about damages does not
19 imply in any way an opinion in my part as to whether damages
20 should or should not be awarded. If you find by clear and
21 convincing evidence that the defendant acted in bad faith,
22 Pennsylvania law provides that you may award punitive damages
23 against the defendant insurer. Now, if you decide that the
24 plaintiff is entitled to an award of punitive damages, it's
25 your job to fix the amount of such damages.

1 In doing so, you may consider any or all the
2 following factors: The character of the defendant's acts; the
3 nature and extent of the harm to the plaintiff that the
4 defendant caused or intended to cause; the wealth of the
5 defendant insofar as it is relevant in fixing an amount that
6 will punish it and deter it and others from like conduct in the
7 future. The amount of punitive damages awarded must not be the
8 result of passion or prejudice against the defendant or on the
9 part of the jury.

10 The sole purpose of punitive damages is to punish the
11 defendant's conduct and to deter the defendant and others from
12 similar acts. That's the charge on the law. After counsel
13 have completed their closing arguments, I will give you what I
14 call those housekeeping instructions on how you will begin your
15 deliberations.

16 MR. PISANCHYN: Your Honor, may we approach?

17 THE COURT: Sure.

18 (The following discussion took place at sidebar:)

19 MR. PISANCHYN: The only issue we have, Your Honor,
20 was that -- with regard to the bad faith, you said knowingly
21 and recklessly. I don't know if you want to do it now. I'm
22 just saying --

23 THE COURT: You object to that --

24 MR. PISANCHYN: You said and.

25 THE COURT: You object to that, okay. Do you have

1 any objection?

2 MR. KASTER: No.

3 MR. PISANCHYN: I'm sorry, Your Honor. I don't mean
4 to be knit picky.

5 (The discussion at sidebar concluded.)

6 THE COURT: Okay. Apparently on page 23 I said --
7 you will get a written copy of the instructions. I read a
8 sentence that says put another way bad faith occurs if an
9 insurer knowingly and recklessly. The proper words are
10 knowingly or recklessly acts with a reasonable basis in
11 handling an insured's claim. That is the charge, "or" not
12 "and", as is in the written instructions that will be given to
13 you. Mr. Pisanchyn, you may continue with your closing.

14 MR. PISANCHYN: May it please the Court, NYCM
15 insurance, Mr. Haddick, Clemens, ladies and gentlemen. My name
16 is Mike Pisanchyn. And I -- today is the date that we must ask
17 ourself if we have the courage to award or fully compensate the
18 Clemens' for what they have been dealing with for a substantial
19 amount of time.

20 In that regard, I first had told you there are rules
21 and there are consequences. The general rule -- we are in the
22 United States District Court. It's a federal court. And as
23 the Court had said and instructed you, for the first time the
24 NYCM insurance and the Clemens' are on a level playing field.
25 The rules as I said in my opening apply no matter how much or

1 how little money you make. And just because you have more
2 money than someone else doesn't mean that you get to push them
3 around. When you make a promise, you're to honor that promise.
4 You cannot put the insurance company's interests before yours.

5 A company must follow the industry standards in which
6 the company is involved in. In addition, you can't Monday
7 morning quarterback. That's what's been happening throughout
8 this case. Every time it's a moving target. Every time you
9 are say, you are relying on the seat belt dense, they said, no,
10 we discontinued the seat belt defense. But that's not in the
11 records. It's what they are saying here today. So that's what
12 has made the case so difficult for the Clemens' is because
13 every time we think that we have a target or at least something
14 that we can say, the rules change.

15 If you don't follow the rules, then there has to be
16 consequences. There has to be consequences to the actions. In
17 this case the story -- the judge had said that you're going to
18 ferret out the truth. And I know that I was lengthy, but I was
19 doing the best I could in order to give you all of the facts
20 good and bad, more good I would hope -- but to give you all of
21 the facts so you could do that.

22 In regard to ferreting out the truth, this case
23 doesn't begin with the Clemens. It just doesn't. The issue is
24 that the story begins with NYCM insurance, and NYCM insurance,
25 if you recall, did not have any written policies or procedures.

1 They had no written policies and procedures despite being a
2 billion dollar -- a billion dollar company. They have no
3 policies and procedures for their insurance adjustors in
4 writing.

5 That, as Mr. Setcavage told you, is far below
6 industry standards and unheard of. Who does not have written
7 policies and procedures in regard to adjustors adjusting
8 claims? In addition you would think that, okay, so what, they
9 didn't have written policies and procedures. But my -- in the
10 plaintiff's opinion, one of the -- the semi most honest persons
11 that got on the stand to tell the truth or some of it was
12 adjustor Dvoracek and probably -- I still am pronouncing his
13 name wrong, Dvoracek, or Dvoracek basically said that if he had
14 those written policies and procedures they would have helped
15 him.

16 If would have helped him, that means the Clemens'
17 case would have been resolved early. If it was resolved
18 earlier, we wouldn't have to be here today. However, there are
19 other reasons, and that is, what is the motive for the Clemens
20 to wait five years or anyone else to wait five years to get
21 paid? Why would they do that? It makes absolutely no sense
22 other than after -- after the period of time that they were
23 waiting they could no longer wait any longer and had to accept
24 the money. Why else wouldn't they take it? It was offered
25 before. Nothing had changed at all. You are to see what makes

1 sense. That's the beautiful part. You have attorneys here in
2 this courtroom that focus on the law and specific little bits,
3 but the beautiful part is all of you aren't lawyers. You are
4 normal people. You can take and utilize all of your experience
5 -- you probably have two, three hundred -- who knows how much
6 experience amongst all you -- to look into and determine what
7 the truth is in this case.

8 And the truth is, I submit, that NYCM insurance had
9 bonuses or incentive programs. The reason NYCM set that up was
10 so that its employees would pay less on a claim. Bottom line.
11 It's all about the bottom line to NYCM, and it's the bottom
12 line. That's what NYCM cares about. This whole time they
13 cared about the bottom line. And they put their employees in a
14 position that their interests -- their interests were greater
15 than their insured.

16 I don't blame adjustor Dvoracek for paying less on a
17 claim because at the end of the day, he has to support his
18 family, too. And if he's going to get money for not paying the
19 claim if every time he comes in, he has a loss ratio and that
20 is over a hundred and he knows he's not getting a bonus, I
21 don't know what I would do. I don't know what I would do
22 because I would want to make the bonus for my family. But it's
23 not adjustor Dvoracek's fault. It's NYCM's. They are the
24 people that set that up in such a way to enforce it to make
25 sure that these claims were being paid less or being drug up.

1 Every corporation owes a duty to its customers or in this case
2 its insureds. It's industry standards, and industry standards
3 demand no less. We had an expert that testified. NYCM
4 insurance --

5 MR. HADDICK: Your Honor, may we approach the bench?

6 THE COURT: No, we can approach after we're done with
7 closings.

8 MR. HADDICK: I have an objection to --

9 THE COURT: I understand that. You can make your
10 objection when we are done.

11 MR. HADDICK: Okay.

12 MR. PISANCHYN: NYCM insurance has said that at least
13 their surplus is \$466 million. So we know that we had one
14 expert testify here today for you. That was called by the
15 plaintiff. I'm not sure why that is. I'm not sure.

16 The jurors are enforcers of safety just like the cops
17 enforce laws out on the street. The -- so when we talk about
18 the facts of this case, we need to begin to think about some
19 things that NYCM did in this case. The first thing is at the
20 end of case, NYCM's -- when they get him for \$25,000 to give
21 in, do they -- are they satisfied with that? No, the testimony
22 was now they are trying to put more in the bargain. We also
23 want to get rid of the bad faith case with the 25,000. We have
24 it. We smoked you out. You can't wait any longer. You are
25 going to accept 25 for both cases now, for both. The Clemens

1 all along were suffering and were in need of money. In regard
2 to this case, it seems like no matter what the Clemens did
3 there would be another obstacle, another hoop, something else
4 that they would have to jump through, and the insurance company
5 made them. They would do one thing. Then there was another
6 thing. They would do that. Then there was another thing.
7 Then they would do that. And then there was another thing.

8 It's the insurance company's way to tell its insureds
9 that if you want to make a claim -- if you want to make a claim
10 as an insured that you're going to pay the price, we're going
11 to put you through the ringer, we will say you misrepresented
12 medical records, we're going to call you names, we're going to
13 put you through depositions, we're going to make you sign
14 authorizations, we're going to -- that we don't send -- we are
15 going to make you do a lot of things to make sure that you know
16 when you make a claim that it's not easy, we're going to send a
17 message.

18 Now, it might be -- the way I had thought was that --
19 well, if they had that much money, why is it they care about a
20 \$25,000 claim or \$50,000 or 25 or 50 if they have \$466 million
21 in -- make 30 million in profits a year. Well, every journey
22 begins with the first step. Even \$466 million, that starts at
23 one dollar. So you have to -- that's how it is. If you take
24 one dollar out of ten million dollar accounts it's one dollar
25 to each person, but that equals quite a bit of money. So I

1 believe -- well, let me say that I believe the evidence showed
2 that NYCM insurance was doing this to the Clemens family.
3 First off, this case is a bad faith case. And in regard to the
4 bad faith case, we need to prevent insurance companies to
5 continue to do the same things as they always have. That's
6 going to be your job when you go back is to say, how -- one of
7 the elements is going to say how do we protect not only the
8 good companies -- because remember good companies -- insurance
9 good companies basically are going -- are -- that are paying
10 valid claims can be going out of business if there's a bad
11 company that is not paying the claims because they are going to
12 make more profit.

13 So in regard to the punitive damage issue, that's the
14 equalizer. That's the equalizer and the thing that can even
15 the playing field to make sure that companies that aren't doing
16 the right thing do the right thing and also companies that
17 aren't doing the right thing get a message by reading it in the
18 paper or hearing about it to make sure -- to make sure that
19 they don't do this to others, and that's what the judge
20 instructed you the purpose of those damages are for. That's
21 the purpose.

22 So the defendant has done everything they can to
23 escape responsibility in this case, everything. The first
24 thing that they began to do was send letters requesting
25 authorizations. All of the higher-ups in NYCM said, we don't

1 send authorizations, why would we send authorizations. You
2 hear the line day. He does it every day, day in and day out.
3 He's not that sophisticated, and I understand that. And that's
4 probably why I believe him over the others. Everyone else are
5 officers of the company. So of course they are protecting the
6 company. You heard the line guy that dealt with this case.
7 What did he tell you? What did he tell you in regard to what
8 they do, NYCM insurance, in regard to authorizations?

9 He said, we always send authorizations, always. In
10 regard to always sending authorizations for things they want,
11 the expert said that was industry standards. So then what was
12 the big deal? They paid -- how much -- and how much time did
13 their representatives at NYCM send the letters saying to
14 produce -- to give us authorizations, why didn't they just
15 produce them and send them and we would have signed them? How
16 do we know they were wrong? How do we know they were wrong?

17 We know they are wrong because what did they do? At
18 the end of the day NYCM sends the authorizations, ten blank
19 authorizations. In 29 days they are signed. So if they were
20 right, then why did they send them? Because they knew it was
21 the right thing to do, it was their responsibility to do it
22 under the insurance contract.

23 In regard to the bonuses, you heard evidence -- and
24 because I don't think you heard direct evidence, but you did
25 hear the judge instruct you in regard to circumstantial

1 evidence. And he kind of told you in the beginning if you
2 recall you go to sleep, you wake up, there's snow or it can be,
3 like, you look, there was no footprints, you see footprints,
4 you following the footprints and there's a guy standing there.
5 You can say, I followed your footprints, and you're standing
6 there. You can -- it's the same as any other evidence -- this
7 is the charge, direct and circumstantial. Circumstantial
8 evidence, the law doesn't differentiate.

9 So if there's circumstantial evidence that this bonus
10 structure played a part and why Mr. Clemens received less
11 money, then that should be the same as direct evidence and
12 something that you must consider. There will be exhibits when
13 you go back. You can review those. So you can see for
14 yourself in regard to this claim and things that happened that
15 I would ask that you go through some of the plaintiff's in the
16 beginning and you will see.

17 Why is it dangerous though for corporations -- why is
18 it dangerous to anyone -- for corporations -- why is it
19 dangerous to the Clemens or the insureds to have the insurance
20 company not send out authorizations? Why is it dangerous for
21 an insurance company to rely on an inapplicable defense? Why
22 is that dangerous? It was dangerous to Mr. Clemens? Because
23 he and his family had lived this experience. When he should
24 have been receiving compensation, he lived this experience for
25 that amount of time. The inapplicable seat belt defense

1 clearly in the adjustor's notes and clearly according to
2 adjustor Dvoracek he relied upon when he set his deserves at
3 \$25,000. He said but for the -- he said the seat belt defense
4 was a negligence defense. He said but for the comparative
5 negligence defense he would have offered the whole amount
6 originally way back when in 2011 and we wouldn't be here. At
7 first he didn't want to say it, but I played the clips. And he
8 had no choice but to acknowledge what he had previously said in
9 his deposition testimony.

10 The statement under oath -- clearly they knew Mr.
11 Clemens had herniated discs. Clearly they knew he had
12 problems. And clearly they were trying to make him drive close
13 to an hour -- I apologize if I exaggerated by five or ten
14 minutes. It was an hour and 48 minutes or something like that.
15 I am not trying to -- when I say two hours -- I will say an
16 hour and a half even. They are making him drive to New York.
17 Somebody said they don't know what a paddy wagon is. When I
18 was a kid, I'd get on my knees and all the kids go through.
19 And in essence, that's what that tactic was. That's what I
20 submit to you. That's a paddy wagon. You want to make a claim
21 -- you want to make a claim. We are going to put you through
22 the claims process at NYCM insurance. That's what we are going
23 to do to you. How do you like it? How does it feel? How does
24 it feel to be Bernie Clemens making 30 or 40 thousand dollars a
25 year? How does it feel? We have we have --

1 THE COURT: You're standing up. You can make your
2 objection. Let's be careful, and this relates to before. I
3 want to wait until the end. I don't like to interrupt counsel.
4 You're only to talk about evidence that's been presented in the
5 case -- all right -- nothing that's not presented. You're to
6 disregard any statements -- there's no proof of that anywhere
7 in this case. There's no evidence. Only things that are in
8 the case, please.

9 MR. PISANCHYN: They asked their insured to provide a
10 statement under oath, but they required that they gave the
11 statement under oath. NYCM insurance asked -- they have the
12 resources to send anyone they wanted to Bernie Clemens or by
13 Bernie Clemens to take this statement under oath. So why is it
14 that they didn't especially when they hired an investigator in
15 or around Scranton, Pennsylvania to take statements? They
16 could have done that any time, anyplace, but they refused to do
17 that. NYCM delayed this claim and put Mr. Clemens through
18 hoops and paddy wagons. That's dangerous.

19 In regard to the subrogation, you heard that Mr.
20 Clemens sent plenty of letters waiving the right of
21 subrogation. You heard from adjustor Dvoracek -- he had said
22 that NYCM doesn't always waive subrogation. He said we don't
23 always waive it. Mr. Clemens could not accept certain portions
24 of money until he received that waiver of subrogation or he put
25 himself at risk, risk of the insurance company coming back.

1 And you heard from expert testimony both in regard to the
2 authorizations and in regard to bonuses, in regard to
3 inapplicable defenses and in regard to the statement under oath
4 and also the waiver of subrogation by an expert. He sat here,
5 and he told you what the industry standards were. He told you
6 the rules of the road, the rules of how insurance companies are
7 to act. He said it.

8 And the question to you is -- I am -- did they follow
9 what the industry standards were in this case? Arbitration.
10 So the plaintiffs finally say, okay, well, apparently we can't
11 agree, let's arbitrate, and they demand arbitration in writing.
12 Now, sometimes I think some persons or companies may learn a
13 lesson here, but sometimes when you're wrong, you have to
14 admit, could we have went to -- could the Pisanchyn law firm
15 and Ms. Albright go to a computer and click a screen? There's
16 nothing that prevented her from doing that. There wasn't. You
17 heard industry standards in Pennsylvania -- which Ms. Albright
18 is a Pennsylvania lawyer -- says demand arbitration and the
19 insurance policy said, upon written demand arbitration would be
20 conducted by the American Arbitration Association. It didn't
21 say anything about going to a computer screen and clicking on
22 things. Could she have done it? She could have. No doubt
23 about that.

24 But the thing I don't understand is, that's all it
25 took, then why did NYCM send back a letter saying it was a

1 nullity? What kind of game is this? Is that what this is, a
2 game with someone's life? Is that what this is? Kind of ha-ha
3 we got them, we told them it was a nullity, they only need to
4 go to the computer screen, ha-ha. That's the game that
5 insurance companies get to play with their insureds represented
6 or not represented? Why wouldn't they just say that? What's
7 the big deal? That's dangerous. That's dangerous.

8 In regard to policies and procedures, started out
9 there, no written policies and procedures. How dangerous is
10 that? You know how many employees they probably have and how
11 many of those employees don't know what they are doing or
12 adjusting claims incorrectly? That's dangerous in regard to
13 not having policies and procedures in writing so that you know
14 how to do your job. How about answering questions of your
15 insured? When your insured asks a question, the only evidence
16 that came in in regard to industry standards is you give them
17 answers. There's been testimony -- and you will see exhibits
18 -- that the plaintiff asked questions for years asking what law
19 applies to this case so we know. What law applies? Is it New
20 York or Pennsylvania? What rules are we applying?

21 But basically what had happened throughout the whole
22 process is that one person would tell us New York. So then the
23 other person would tell us it's Pennsylvania. So Catalano says
24 it's Pennsylvania. Dvoracek says it's New York. And it's kind
25 of like a ping-pong ball. When we start doing it this way, no,

1 no, it's Pennsylvania, okay, no, no, no, it's New York.
2 Basically they do this all day. This is basically what I get.
3 That's in essence what the insurance company required us to do
4 because they didn't make -- and as industry standards require
5 -- at least making a decision in the beginning in regard to
6 what law applied.

7 If they were going to play that game, they should
8 have filed, as the expert said, a dec action with the Court
9 that could have made that determination and would have laid out
10 the rules of the playing field to Mr. Clemens. When an
11 insurance company doesn't answer its insureds and that's an
12 industry standard or rule, that's dangerous. It's also
13 dangerous to leverage. You heard Mr. Pylinski, yeah, we are a
14 plus rating, we love that, and that's great because we have
15 leverage. It's nice to have leverage. It's nice to be an
16 insurance company who has leverage.

17 I submit it's not nice for the other party to not
18 have that leverage. In regard to credibility, there's
19 something Your Honor instructed in regard to false in one,
20 false in all. And you heard the testimony -- I am not going to
21 say who did what or when because you just sat here. It's not
22 like it was two weeks ago. It was this week. But the
23 witnesses that testified you heard on several occasions that
24 they may have made false statements. We talked to the line guy
25 that's not a corporation looking after the corporation so much,

1 not as savvy. That's okay. He comes in here and tells us his
2 honest opinion. What does he say? He says Wildey was his
3 supervisor, they work together all the time, I never saw them
4 do any type of special treatment. So which is it? In regard
5 to adjustor Catalano, he never had a note in the adjustor's
6 notes that we received, not one despite him being the
7 supervisor. So in regard to why Catalano, Dvoracek, Pylinski
8 -- you will have to review that jury instruction and take their
9 testimony for whatever you feel it's worth. I can't say what
10 to do. I don't know what you're thinking.

11 However, also the judge instructed you the witness on
12 the stand -- you will hear things such as the ring of truth. I
13 am not sure what that means. I think I know what it means.
14 Sometimes you know when someone is up there and being honest
15 and not telling you what you want to hear like a witness I
16 recall -- do you know Pennsylvania -- I asked him if he knew
17 anything about Pennsylvania law. He said no. Then when his
18 attorney came up and asked him something about Pennsylvania
19 law, he agreed yes, that's Pennsylvania law. I said, how do
20 you know that you if don't anything about Pennsylvania law. He
21 said, well, I guess that's true. In regard to the credibility
22 of witnesses though, I would submit to you that the expert that
23 came here was honest, truthful, respectful and basically said
24 what the industry standards were. I asked questions that he
25 told me that I was wrong as well. So he wasn't just coming in

1 here and saying whatever I wanted him to. He is an industry
2 expert. He stated that he's nationally recognized. He travels
3 to all over the state testifying in regard to these issues
4 because that's what he owes. That's what he knows, and that's
5 the only expert that we had which means that's the only
6 industry standards you can consider.

7 If there was other industry standards, we would have
8 heard about them. In regard to bad faith and why, we are -- we
9 believe we proved our case in regard to a number of issues.
10 Policies and procedures. There is no arbitration issue, they
11 never answered the questions of our insureds. They required
12 that both be settled. Statement under oath, not sending
13 authorizations and based on the fact they admit they always
14 send them. The expert said -- went on to say all the industry
15 standard violations there were. So when you go back to the
16 jury room, the first question you're going to have to ask or
17 answer -- I think the first one the judge will tell you later
18 is you're going to have to select a jury foreman.

19 But after you -- after that question is asked, then
20 you are going to get a verdict form. And when you get this
21 verdict form, this is what is going to look like. And it's --
22 it basically -- the first question on it is going to ask has
23 the plaintiff established by clear and convincing evidence that
24 the defendants acted in bad faith in handling his underinsured
25 motorist claim. And I would suggest -- obviously it's up to

1 you, but I would suggest that during this period of time a
2 five-day trial that the plaintiffs have proven that by clear
3 and convincing evidence without a doubt. We don't even have to
4 prove it beyond a reasonable doubt, only by clear and
5 convincing. It is more than a preponderance. You heard the
6 testimony, and we don't have to do that in regard to all these
7 issues. It's only in regard to one.

8 You heard Mr. Setcavage basically say these are the
9 industry standards, if they were breached, they would be bad
10 faith. It's not like if you say, well, it's arbitration -- no,
11 you have to move on to the next issue and determine if there
12 was bad faith with the authorizations. It if there was bad
13 faith with the authorizations, that's bad faith. You can go on
14 and so forth in regard to all of the issues. If you find bad
15 faith was committed, it's a yes. The next issue that you would
16 then be deciding is damages. It's really important. This case
17 is about their actions.

18 The award of damages is going to change their
19 actions. That's the whole point. That's the whole point of
20 the trial in regard to the plaintiff's side is to make sure
21 they change the way they act and other insurance companies
22 change the way they act. That's the point.

23 I'm just telling you. That's point of the
24 plaintiff's side that the Clemens had or deal -- sat through
25 and done this for this many years, this principle. When you

1 make a decision, you are going to make a decision for the
2 community. You're the voice of the community. Right now, in
3 about -- once we all close -- and I -- you are going to be the
4 eight more -- eight most powerful people not only in this
5 courthouse but in Scranton because there's no other jury trial
6 at least that I know. In fact, the judge is going to make,
7 maybe Barbie -- raise her hand and swear her in and have her
8 take you to place that no one has access to, not even the judge
9 -- not even the judge can go back there. And you ask anything
10 you want. And you would be deciding this case. When you speak
11 though, you're speaking for the community. You're going to be
12 telling people about the community attitudes. You're the
13 conscience of the community. That's in essence what a jury is.

14 And you're going to say whether or not the
15 defendant's conduct was acceptable in this community. What is
16 the attitudes of the community, and is the defendant's actions
17 acceptable? That's what you're going to be deciding. I
18 understand that you've been taken away from your family to make
19 a decision in regard to a case that you probably never wanted
20 to have any part of and also that, you know, you don't know the
21 parties. But that's what the law provides.

22 The law provides, and I ask you render a verdict
23 that's meaningful. We sat here for five days. Five days. And
24 whatever your verdict is, I don't care as long as it's
25 meaningful to tell the parties and -- any party what they

1 should or should not be expecting from the other side. The
2 judge said in regard to all other parties -- his instruction
3 was that a corporation and Mr. Clemens are both on the level
4 playing field. They are both the same. Even though they are a
5 corporation and they have all that money, that means nothing.
6 When you go back in that room -- that means nothing. They lose
7 all of that power. They lose all that leverage with you eight
8 going back there. All that power is gone.

9 It's in your hands. Now, in regards to punitive
10 damages, there are three factors you are to consider. The
11 first is you must consider the defendant's acts. You have to
12 look at all of the things they did and did not do. Okay. You
13 will get those back -- it's my understanding the Court will
14 give you these instructions. I pull them up so I make sure I
15 read them correctly. But you're going to consider the
16 character of the defendant's acts. You're going to consider
17 the nature and extent of harm to the plaintiff that the
18 defendant caused or that he intended to cause. By he I mean
19 NYCM insurance. What did NYCM insurance intend to cause the
20 Clemens family?

21 What did they intend to cause the Clemens family when
22 they continually requested authorizations? What did NYCM
23 insurance intend to cause when they were trying to require Mr.
24 and Mrs. -- Mr. Clemens at least to travel to Liberty, New
25 York? What did they intend to cause the Clemens family when

1 they decided not to arbitrate? What did they intend to cause?

2 They intended to cause bad credit.

3 MR. HADDICK: Your Honor -- I apologize. There's
4 been no testimony of bad credit or family strife in this case.

5 MR. PISANCHYN: It's what they intended to cause,
6 Your Honor.

7 THE COURT: No. You're not allowed to talk about
8 things that are not in evidence in the case, and that is
9 stricken. Please talk about whatever the evidence was and
10 reasonable arguments related to that. You're not allowed to
11 talk about things that there has been no evidence in the case
12 about.

13 MR. PISANCHYN: I will move forward, Your Honor. In
14 regard to -- the biggest reason for punitive damages is -- the
15 biggest factor in this case is going to be the extent of the
16 damages they intended to cause, and also -- you're going to
17 also be considering -- and the judge will instruct you, you are
18 to consider or you may consider the wealth of the defendant
19 insofar as relevant in fixing an amount that will punish and
20 deter others and others from like conduct in the future.

21 So basically we deterred this insurance company from
22 doing this to its insureds and also to make sure other
23 insurance companies know not to do this to its insureds. So
24 that's where the \$466 million comes in. The only best way I
25 can explain it to you is this. If I have a hundred dollars --

1 that's how much I have. We're out in a restaurant, and I don't
2 like you and I punch you in the face, and you punish me by
3 taking one dollar or one percent from me, would that deter my
4 future conduct?

5 So I have a hundred dollars, and you were at a
6 restaurant, and I came over and knocked you off the stool, and
7 I had a hundred dollars and you took one dollar from me, you
8 think that would prevent me from doing that again? Would it?
9 There's no difference here. We have a hundred dollars, one
10 percent. I understand they make more money. That's we're
11 they're here, because of leverage. That goes away when you go
12 in that room there. The issue here is that they have
13 \$466,433,113 of surplus. That means if they pay all their
14 expenses, that's how much they have left over.

15 Even though that they were a mutual company and they
16 say that they pass that on -- the savings on to their -- their
17 insureds apparently, they still make \$30 million was the
18 testimony in 2012, I think -- and they have \$466,000 (sic) in
19 surplus. If I wanted, we can get into -- it says the net
20 worth. You can get into this number, one billion -- one
21 billion dollars. I am not asking -- because it's my
22 understanding it says that you will assess in regard to net
23 worth.

24 But if -- if we don't take net worth instead of on
25 this side -- if we took percentages to deter future conduct,

1 even at one percent, it would be that number. That one
2 percent. Again, this is important to deter future conduct not
3 only for NYCM but for all insurance companies so when they look
4 and say, hey, you think we should mess with Mr. Clemens, and
5 you think we should mess with Joe, you think we should mess
6 with Mrs. So and so or Mr. So and so, it sends them a message,
7 no, it's not going to be worth it. Do the things you're
8 supposed to do. There's something called justice and
9 injustice.

10 Justice means fully awarding someone the right amount
11 of money. Injustice means giving them too much or too little.
12 That's going to be a decision you're going to have to make.
13 But if you give too little, that's injustice. If you give too
14 much, it's injustice. You're going to have to look at these
15 numbers, figure out in regards to the percentage and what type
16 of message has to be sent to be sure NYCM stops doing what you
17 heard about in this courtroom.

18 When you return your verdict, we hope that regardless
19 of what you come to that you return a verdict without fear,
20 without favor, without prejudice. We don't want sympathy.
21 Sympathy is a form of charity, and I can tell you Mr. -- I can
22 tell you that Mr. Clemens does not want any charity in this
23 case. He has pride, and he has the right to continue to have
24 that pride.

25 However, if he had to go through this experience,

1 then the evidence will show -- or the evidence did show that
2 your award should be just and fair. Now, there's also going to
3 be a transcript of this proceeding. And, in fact, I get an
4 e-mail every day when I am on my way home that basically said
5 there's a transcript that's been filed of record in this case
6 of all of the testimony. At some point -- at any point
7 actually, Mr. Haddick may have -- people can get that, anyone
8 -- someone's kid child can get these transcripts, and they are
9 going to read some day about Mr. Clemens, eventually
10 grandfather Mr. Clemens, who knows. When they read the
11 transcript, they are going to hear that the attorneys were in
12 essence saying Mr. Clemens misrepresented -- a fancy word for
13 saying he lied, he lied about his injuries.

14 That's what's on this record from a person such as
15 her that is typing and being filed in a federal courthouse that
16 anyone can have access to. That's important because some day
17 the Clemens family may -- somebody may look into this, and
18 they'll want to know whether or not Bernie Clemens, in fact,
19 did misrepresent. And it's going to be up to you to determine
20 No. 1, in regard to did NYCM committed bad faith. No. 2,
21 amount of award that will prevent them from doing this again.
22 I normally would say I would not have another chance to talk to
23 you. However, the federal rules provide -- the defense
24 attorney will go next. And then I get a chance to rebut what
25 he says. Thank you. You've been very kind with your time.

1 THE COURT: Mr. Haddick?

2 MR. HADDICK: Would it be appropriate to ask for a
3 five-minute bathroom break? In the meantime I would like to
4 approach.

5 THE COURT: Sure. We will take a five-minute break.
6 We will come back out. No conversations or discussions yet.
7 You're not starting your deliberations. No review of anything.
8 Do not touch the screen inside at all at this stage, and then
9 we will see you in a couple minutes.

10 (The jury left the courtroom at this time.)

11 MR. HADDICK: Would you like me to give the
12 objections at once or --

13 THE COURT: Go ahead.

14 MR. HADDICK: No. 1, I don't believe it's appropriate
15 for Mr. Pisanchyn to ask the jury for a specific amount of
16 money. I would like to request that that chart be marked as an
17 exhibit and retained by the Court as evidence of what I believe
18 is an improper request for a specific sum of money. My second
19 objection is that plaintiff's counsel misunderstood, misused
20 and misrepresented the word leverage as talked by Mr. Pylinski.
21 Mr. Pylinski was speaking of credit leverage which goes into
22 the A. M. Best Rating. He converted the use of that word and I
23 believe misrepresented the evidence to suggest that somehow Mr.
24 Pylinski was talking about leverage over insureds. I object to
25 reference by plaintiff's counsel that New York Central Mutual

1 required or conditioned the plaintiff to settle two cases at
2 one time. Mr. Setcavage donated all of two lines in his
3 report, and I don't believe he did testify in support of that.
4 I asked him what evidence he was aware of. He pointed to no
5 evidence which specifically said that settlement was
6 conditioned on settlement of two cases rather than one. I
7 object to --

8 THE COURT: Maybe we have to --

9 MR. HADDICK: Two more. I object to Mr. Pisanchyn's
10 reference to item two of the punitive damages criteria
11 regarding harm to the plaintiff. There has been no evidence in
12 this case of any harm to the plaintiff. The plaintiffs have
13 not testified. Finally, in direct disobedience to the ruling
14 the Court made earlier in the case, Mr. Pisanchyn yet again
15 referred to sending a message to other insurance companies.
16 Under State Farm versus Campbell and the Phillip Morris case,
17 that is impermissible argument.

18 I intend to file a motion for contempt later in the
19 case, and those are the objections I have.

20 THE COURT: Let me go through. As to the last one
21 the, the standard charge in Pennsylvania does refer to other,
22 and so that is the standard charge in Pennsylvania. And -- I
23 don't believe that violates the confines of the Phillip Morris
24 case which had a different -- that was the United States was
25 bringing the action against Phillip Morris. That was a

1 different connotation there. The Pennsylvania law has not
2 changed in that regard as far as I know in terms of that
3 charge. Going back to your first one, the question of the --
4 the exhibit, the Court keeps no exhibits. So you know, you're
5 all responsible to keep your own exhibits, and you're
6 responsible to keep your own exhibits for purposes of appeals
7 by either side. So you can make a copy of that.

8 You can take a photo of that. You can do whatever
9 else you want to do with that. Mr. Pisanchyn will, of course,
10 have to keep them. I don't think the argument that was made
11 asked for a specific amount. I think it referred to the net
12 worth, and then he was talking about what he thought
13 percentages would indicate punishment. But I don't have a
14 recollection of him saying that I want one million, four
15 million, 462,000 or anything of that nature. So that's kind of
16 walking that fence, and although -- I don't know that it's
17 anything that requires any kind of other activity. Your second
18 argument was?

19 MR. HADDICK: Misuse of the term leverage as given by
20 Mr. Pylinski.

21 THE COURT: As I said to the jury , that the
22 statements of counsel during closing arguments are not evidence
23 in the case, so you will have an opportunity if you want to
24 address that to address that. Third one?

25 MR. HADDICK: Third one was the statement about

1 conditioning of settlement on two cases on the offer.

2 THE COURT: Where was there any evidence in this case
3 about that? I don't recollect any of that.

4 MR. PISANCHYN: Your Honor, we went up and, in fact,
5 he objected. I had show you where in his report where he said
6 it. Do you recall? I actually had to show you in the report
7 where he said it in order to get it in because he objected and
8 said, remember nowhere in his report does it say --

9 THE COURT: Where is the report? I remember looking
10 at the report for a specific argument.

11 MR. PISANCHYN: That's what we were looking at.

12 THE COURT: Give me the report.

13 MR. HADDICK: While he's looking for that, Judge, I
14 believe the report said that the conditioning of settlement of
15 the U. I. M. claim.

16 THE COURT: I remember that --

17 MR. HADDICK: The general proposition.

18 THE COURT: So then -- that objection is overruled as
19 well. It's argument of counsel based upon some discussion of
20 whether that -- whether the settlement of both would violate
21 good principles and practice in the law. What was the fourth
22 one?

23 MR. PISANCHYN: You discussed them all.

24 MR. HADDICK: I don't have anything else .

25 THE COURT: You need a bathroom break?

1 MR. HADDICK: Yes, thank you.

2 (A brief recess was taken.)

3 MR. HADDICK: Ladies and gentlemen, my mother likes
4 to tell people that when I was eight she knew I was going to be
5 a lawyer because I talked my way out of getting stood in the
6 corner. She also told me -- sometimes I can be a little
7 stringent. And so right about the time I graduated law school,
8 she said you should always do two things if you are going to
9 talk to juries. You should, first of all, thank them for their
10 time, and second of all, you should apologize if you offended
11 them in any way in the course of defending your client.

12 So I ask you if I have in any way offended any of
13 you, please not hold it against New York Central Insurance
14 Company and chalk it up to just a zealous advocate. A federal
15 United States courthouse is not a slot machine. It is not a
16 casino. All of the things that we see here, the wood,
17 ceilings, the large windows, the judge elevated on the bench,
18 those are symbols of important things. It's why we don't have
19 trials on the street.

20 The symbols are meant to remind us that you are here
21 for a serious duty and that justice is to be done here. Not
22 wagering, not gambling, not hoping to strike it rich. This is
23 not a slot machine. In the last four or five days, what you
24 have seen, is you have seen a lawyer attempt to turn a
25 courtroom into a slot machine. It takes a tremendous amount of

1 fortitude to stand up without even putting your clients on the
2 stand so you can hear them and hear me cross-examine them. It
3 takes a tremendous amount of gumption to put up figures like
4 one percent of a hundred billion dollars or one percent of
5 \$467,000. That's an insult to you. It's an insult to your
6 intelligence, and it's an insult to this process. You should
7 not tolerate it. Pat, exhibit 82. Go back to the cover page.
8 At the beginning of this case I told that you we would prove
9 that this claim resolved in four days of the plaintiff turning
10 over what New York Central had been asking for for three years.

11 We proved that. We have proved it not by what I
12 said, not by speech. I have proved it by showing you the
13 documents, and Mr. Kaster has proved it by walking you
14 yesterday and very briefly this morning through a series of
15 documents which leave no question that New York Central Mutual
16 acted reasonably and attempted for three years to get these
17 people to cooperate. This is not a slot machine.

18 Those dates up on the screen in front of you, we have
19 showed you the documentation and told you the date of the case
20 settlement as determined by Court order. There are another
21 four -- there is another four-day period I want to talk to you
22 about. That is the four days of our lives which has just been
23 wasted. Mr. Pisanchyn came into this courtroom and thought he
24 would wonder around for four days asking witnesses questions,
25 showing clips of deposition testimony that was consistent with

1 the witness' testimony in the hopes that something, something
2 in four days might stick to a wall. That is not what this
3 place is for. This place is not for test trying cases. This
4 place is to come here with real grievance, real evidence, and
5 real proof. It's not a place to come and test theories out and
6 waste the jurors' time. It was a case presented by Mr.
7 Pisanchyn which was extremely scattered. And it was in the end
8 about nothing but stick figures, smoke and mirrors.

9 You don't have to take my word for it. I have a copy
10 of the promises Mr. Pisanchyn made in his opening statement.
11 I'm going to read you some of those promises. I want you to
12 decide now -- as part of your deliberations I want you to
13 decide whether or not Mr. Pisanchyn kept his promises to you.
14 During the claims process Mr. Pisanchyn said when Mr. Clemens
15 is trying to get paid, he's injured, he's hurt, his family
16 needs money because he can't work. Do any of you remember a
17 single piece of paper, a single exhibit or any testimony from
18 Mr. Clemens himself that he's trying to get paid, injured, his
19 family needs money or because he can't work? Did we hear any
20 evidence in support of that claim?

21 Mr. Pisanchyn told you during the period of time of
22 the claim even -- all the way up until just recently he said,
23 New York Central Mutual continued to say that New York law
24 applied the evidence will show. Did the evidence in this case
25 show that up until very recently New York law applied the seat

1 belt defense? Was that ever, ever a factor after December
2 30th, 2011, three years before they turned over wage records we
3 had been seeking for the same amount of time? Mr. Pisanchyn
4 said, his client's responsibility to give an examination under
5 oath, so they asked for a statement. We have to provide a
6 statement, and there is no dispute about that. Well, if you
7 agree -- and there's no dispute about having to provide a
8 statement -- why did you avoid two separate attempts to
9 schedule your examination under oath? Even Mr. Pisanchyn
10 agrees they have a responsibility to do it. Why wasn't it ever
11 done? Pat, the timeline, please.

12 We have showed you at the beginning of the case the
13 timeline. They were meaningless -- not meaningless, there was
14 diamonds on it with dates. Mr. Kaster with Mr. Catalano
15 yesterday and today showed you a piece of paper on your
16 monitors supporting every single diamond on that timeline.
17 Now, Mr. Kaster didn't spend hardly as much time as Mr.
18 Pisanchyn. But Mr. Pisanchyn proceeded to tell you about what
19 something said and not show you. With all this marvelous
20 technology, with the giant staff he has here in court today, he
21 didn't show you a lot of evidence. He told you a ton of
22 things.

23 But as the judge told you, your verdict must be based
24 on the evidence. You have to ask yourself, of the two parties
25 in this case who showed you what happened and who simply try to

1 tell you what they happened or what they would like to have
2 thought happened. We will get into that more in a minute. Mr.
3 Pisanchyn during his opening statement told you he was going to
4 prove that Jim Dvoracek had over 250 claims. Mr. Dvoracek
5 rather clearly yesterday testified he had between 150 and 250.
6 I will have a little more to say about Mr. Dvoracek in a
7 moment.

8 Mr. Pisanchyn told you in his opening statement you
9 will see that the plaintiff sent over 10 to 15 letters asking
10 that to the point where they put in a yes or no and asked that
11 NYCM just circle the answer and despite that no answers were
12 given. How many letters did Mr. Pisanchyn actually show you?
13 I don't know how many, if any, one, maybe two. Have you seen
14 10 or 15 letters?

15 Mr. Pisanchyn said he was going to prove to you that
16 NYCM knew that they had Clemens where they wanted them and so
17 what they do -- what NYCM does is they require that Clemens
18 settle both cases, settle the SUM claim and the bad faith case
19 as one. What evidence did we see with that? Isn't the fact
20 that we settled the U. I. M. claim a year ago and the fact
21 we're here in a bad faith trial the best possible proof that my
22 client did not condition the settlement of one claim upon
23 another? We didn't condition the settlement of the bad faith
24 case upon the money we paid in the SUM claim because if we did
25 and they took it, we would not be here.

1 I asked Mr. Setcavage, who was paid a mind numbing
2 \$32,000 to come in here -- I asked Mr. Setcavage to show me
3 where he saw evidence of that particular claim of wrongdoing.
4 You will recall Mr. Setcavage was unavailable to point to
5 anything, although he certainly paid -- was paid to review a
6 lot of documentation. Mr. Pisanchyn told you all the documents
7 say that Mr. Clemens would do that, meaning give a statement
8 under oath at any point at a reasonable distance of where he
9 lived in Pennsylvania at a reasonable time. Scranton,
10 Pennsylvania, is by judicial order in this case 45.7 miles from
11 Stroudsburg.

12 You saw through Mr. Kaster's questioning of Mr.
13 Catalano an attempt by my client to take an examination under
14 oath here in Scranton. If New York was too far, why couldn't
15 you come to Scranton? Why can't you propose alternative
16 locations? I'll explain a little more about that in a moment.
17 First off, the evidence will show Mr. Pisanchyn said the
18 Clemens family had experienced bad credit, that they had family
19 stress and anxiety. This case has been going on now for years.

20 They have transcript fees, attorney's fees. And as
21 anyone knows, when you lose enough money at this point it
22 translates over quite some time. Do you remember any evidence
23 that the Clemens' family experienced bad credit? Do you
24 remember any evidence that the Clemens had family stress and
25 anxiety? Do you remember any evidence of that, ladies and

1 gentlemen? You are not to take what Mike Pisanchyn tells you
2 as evidence.

3 You are to take what you hear or heard from that
4 stand and saw on your monitors as the evidence in the case.
5 What evidence have we heard about the change in life quality to
6 the Clemens? What evidence have we heard about Mr. Clemens'
7 current salary? Mr. Pisanchyn talked about that. We have
8 heard no evidence of that. Those are broken promises. If you
9 want to talk about broken promises, perhaps New York Central
10 Mutual shouldn't be the party on trial here. Mr. Pisanchyn
11 made a ton of promises in his opening remarks, and he failed to
12 deliver on those. It's my job to tell you he failed to deliver
13 on those.

14 The case that Mr. Pisanchyn gave you in his summation
15 exists but in one place, and that is Mr. Pisanchyn's own mind.
16 Because if it existed elsewhere, you would have seen it. You
17 would have heard it. This place is not a slot machine. I
18 spent some time discussing what Mr. Pisanchyn has not talked
19 about. Now I am going to discuss with you some of the topics
20 which have consumed the last four days of your lives.
21 Pronunciation of names, the living arrangements of witnesses,
22 New York Central Mutual's organizational charts, software
23 including Lotus Notes, how files are kept, the merits of Skype,
24 the family history of the Robinson family, New York Central
25 Mutual's credit rating. None of that -- none of that has

1 anything to do with why we are here. It's an insult to your
2 time and my time and to the Court's time.

3 Pat, if you could please go to the bullet points from
4 exhibit 82. Bullet points are generally not good unless you
5 prove what is in the bullet points. Don't give more than three
6 or four. The entirety of Mr. Pisanchyn's summation was bullet
7 points. He's telling you -- he's not showing you. We have
8 shown you that the plaintiff refused or ignored 16 requests for
9 medical records. Next please. Plaintiff ignored or refused
10 three requests for medical bills. The plaintiff refused at
11 least two requests for examination under oath. The plaintiff
12 comes in here and blames New York Central for delaying the
13 claim when the plaintiff is responsible for all but four days
14 of this claim, a thousand days -- almost 1,100 days.

15 You recall hopefully Mr. Setcavage who had to justify
16 a fee, tried to tell me that it would not necessarily have been
17 helpful if the plaintiffs had turned over the ten year wage
18 history we asked for in 2011. I don't understand how he could
19 have answered that question that way. Actually I can
20 understand why he could possibly answer the question that way.
21 There are 32,000 reasons why he would answer the question that
22 way. Mr. Setcavage's opinion was bought. It was purchased.
23 It was not earned.

24 Pat, go back to the documents. I am not going to
25 torture you by going back over the documents. I'm just going

1 to show you in very quick fashion the request for medical
2 records and authorizations, the requests for work records, the
3 correspondence seeking examinations under oath. I didn't just
4 tell you about those. Mr. Kaster and Mr. Catalano showed you
5 those, which by the way was not a necessarily captivating
6 presentation. And Mr. Kaster did go through as quickly as he
7 could. The importance of those documents, however, require
8 that we show them to you because that is essentially our
9 defense in this case that we tried and tried and tried and
10 tried. We tried and tried again to get the information from
11 the Clemens and their lawyer which would help us evaluate the
12 claim. Pat, please turn to exhibit 54.

13 I will not bore you again with reading the provision.
14 I just want to remind you we saw earlier, this is from the
15 insurance policy which governs this case. This policy says --
16 you can call them hoops or call them whatever you want. This
17 policy says if you want money because you're hurt, you have to
18 prove you were hurt. That's not unreasonable. You recall Mr.
19 Setcavage admitted that it was not unreasonable for an
20 insurance company to investigate a claim.

21 That's part of what you will discuss and deliberate
22 in the jury room. Is it reasonable to try to obtain these
23 records? Well, the insurance agreement says it's reasonable
24 because that's the agreement. New York Central Mutual
25 Insurance Company is not obligated to Mike Pisanchyn's word for

1 it. That's not how this works. It's not how it works here
2 either. One of the things the judge talked to you about in his
3 instructions to you was the issue of whether or not the
4 insurance company had a reasonable basis to question the claim.
5 I'm going to show you some exhibits now which are in the case,
6 and I want you to in your mind -- not necessarily right now.
7 When you go back to deliberate, I want you to remember these
8 exhibits and ask yourself is there a reasonable basis to look
9 into this claim further, is this a straightforward consistent,
10 well documented proven claim, or is there a right on the part
11 of the insurance company to scratch its head, if you will, to
12 sort of say, maybe we should look at this further. Pat,
13 exhibit 61. These are documents, by the way, provided by the
14 plaintiffs initially. Page D. 590.

15 You were shown that despite -- that's a great idea.
16 You were shown that despite Mr. Pisanchyn's claim -- I can't
17 say Mr. Clemens' claim because he did not testify. Despite Mr.
18 Pisanchyn's claim of catastrophic vertebral injuries, Mr.
19 Clemens on the night of the accident was out of the hospital in
20 one hour and 19 minutes. Next slide. Page 597. D. 597. I
21 apologize.

22 I showed you this earlier. Getting out of the
23 hospital in 98 or so minutes, it's consistent with that
24 diagnosis, nasal contusion. The Clemens' family medical bills
25 have been paid by the first party carrier. Wage loss have been

1 reimbursed. He's been given 25 grand for a bump on his nose.
2 This is gravy, this case. This is the shocker. This is the
3 pull on the handle of the slot machine. Mr. Pisanchyn is
4 looking for three cherries to come up. This isn't a matter of
5 compensation. If it was, we wouldn't be here. Compensation
6 had been paid. They agreed 25,000 was sufficient compensation
7 for his injuries. Pat, exhibit 70, please, page D. 805. If I
8 tell you -- if I stand here -- no, if I tell a doctor my neck
9 was fractured, the doctor won't just take my word for it
10 especially if I am upright in no apparent distress. The doctor
11 will do studies.

12 There was a study done on the night of the accident,
13 a radiology study on Mr. Clemens' nose. History -- Pat,
14 highlight history. Pain. Pain is a subjective symptom. I'm
15 in pain. I'm not questioning on the night of the accident Mr.
16 Clemens was in pain. He reported his nose hurt. So he took a
17 picture of it, and the conclusion -- Pat, if you can highlight
18 that -- simply negative study. No nasal fractures. Mr.
19 Pisanchyn never once showed you a confirmed official diagnosis
20 of either a cervical fracture or compression fracture.

21 Pat, exhibit 71, please. Page D. 806. In fairness
22 to Mr. Setcavage he said sometimes multiple vertebral fractures
23 go undiagnosed. That's fair. I am showing you exhibit 71. It
24 is a full body scan. It's a diagnostic study. History,
25 shoulder and neck pain. Now, a full body scan is that which it

1 says it is. It is a full body scan. With due deference, Pat,
2 pull the date up on that. If you go to the bottom, I think the
3 date is on the bottom, transcription dates. Dictated September
4 18th, 2009, transcribed September 18th, 2009. The date of the
5 bone scan September 18th, 2009. Nine days later, the time when
6 Mr. Setcavage said you might not notice it until later, there
7 was a study done. The doctor looked. The doctor found a
8 normal bone scan. No cervical fracture, no compression
9 fracture, nothing.

10 Now, if a man comes to an insurance company and said,
11 I broke my back in a car accident and the insurance company
12 gets records which state this, is it reasonable to question the
13 nature and extent of the injury? Of course it is. Pat, if you
14 could please do -- exhibit 65 and 66. I asked Mr. Setcavage
15 about red flags. Ladies and gentlemen, why would somebody
16 describe his injuries from the same automobile accident
17 different in two different claim forms? How does that happen?

18 Well, perhaps it happens because the first party
19 process really all you're going to get paid is medical bills
20 and wage loss. The first description -- or one description is
21 that the injuries include but not limited to shoulder, back,
22 nose, head, whiplash and cuts. The word neck appears nowhere
23 in there. The second time a claim form is submitted the injury
24 changes. Now all of a sudden there's an odontoid fracture,
25 neck fracture, break, whiplash, neck, shoulder pain, L. 5

1 compression, compression fracture. Mr. Setcavage who was paid
2 \$32,000 could not tell me when I asked him whether or not the
3 notice of intent to submit claim form indicating neck fracture
4 was submitted before or after Mr. Clemens consulted with an
5 attorney. Next please, Pat, exhibit 6, page D. 392 in a side
6 by side with exhibit 74, D. 809. Please -- if you're not
7 paying attention to my remarks -- which I don't know how you
8 could not be because it's so enthralling I am sure. If you pay
9 attention to nothing else, pay attention to something I am
10 about to show you. It's about the reasonableness of
11 questioning this accident. Exhibit 61. Page D. 392. Exhibit
12 74, page D. 809. Pat, I am looking for the emergency room
13 notes on the left-hand side -- I will blow these up in a second.
14 I want to give Pat a moment to get exhibit 74 D., page 809.
15 Take your time. All right, ladies and gentlemen. Pardon me
16 for moving.

17 The document on the left is the history Mr. Clemens
18 gave to the hospital personnel in Pocono Emergency Center
19 emergency room the night of the accident. If you go to the
20 notes, please, Pat, middle of the page -- patient presents
21 after he was an unbelted passenger in a head on collision with
22 another car. His hit and broke the windshield. He denies L.
23 O. C., loss of consciousness, he has multiple small abrasions
24 on his face and forehead, initially bleeding from the left
25 nose. He self extricated and was ambulatory at the scene.

1 MR. PISANCHYN: Your Honor, after -- is that when we
2 are doing it?

3 MR. HADDICK: You can take the highlight --

4 THE COURT: The objection is?

5 MR. PISANCHYN: It's clearly precluded --

6 THE COURT: What?

7 MR. PISANCHYN: Precluded.

8 THE COURT: This is not in evidence.

9 MR. HADDICK: It's in evidence.

10 MR. PISANCHYN: Not in an unredacted form.

11 MR. HADDICK: It's an excerpt from an emergency room
12 note, Judge. It's an exhibit.

13 MR. PISANCHYN: Your Honor, can I approach --

14 THE COURT: Sure.

15 (The following discussion took place at sidebar:)

16 MR. PISANCHYN: No evidence -- sorry to interrupt.

17 THE COURT: Are you ready?

18 MR. PISANCHYN: Your Honor, it's saying he was an
19 unbelted driver. Specifically precluded -- it's specifically
20 has been precluded by this Court. That record -- I am just
21 telling you -- unbelted driver --

22 MR. HADDICK: I will not comment on that.

23 MR. PISANCHYN: You are showing it to them.

24 THE COURT: Hold on. Hold on. The exhibit is in
25 evidence. The use of the --

1 MR. PISANCHYN: Unbelted. I mean, that was --

2 THE COURT: I am just going to tell them that has no
3 relevance to the case and not to be considered by them.

4 MR. PISANCHYN: I say we move forward. I didn't want
5 to continue to leave it up.

6 THE COURT: I don't know. You can --

7 MR. HADDICK: I am talking about loss of
8 consciousness and the --

9 THE COURT: You want to leave the exhibit up? He has
10 to black out the --

11 MR. PISANCHYN: Just take it down.

12 (The discussion at sidebar concluded.)

13 THE COURT: The statement of whether he was belted or
14 unbelted doesn't have any bearing on this particular case here.
15 This is different than the issue that's been discussed before
16 about what law applies. At the end of the day, that has to
17 relevance to your determination. We will have that word
18 excluded, and then we can look at the rest of note.

19 MR. HADDICK: If we can look at those documents side
20 by side without reference to the materials that are not part of
21 the case. The last three lines, Pat, the -- yes, exactly,
22 thank you. All right. On the night of accident, he denies L.
23 O. C., small abrasions on face and forehead, self extricated
24 and ambulatory at the scene. That's what he told the emergency
25 room staff within hours of the accident. On the right there's

1 a report dated much later.

2 The evidence will certainly reflect that the evidence
3 -- that this date -- pull the date of the report, Pat, first,
4 please. March 3, 2010. Now, this is -- we can agree I believe
5 that certainly on the night of accident Mr. Clemens hadn't
6 gotten himself a lawyer yet. By March 2010 he had. And I am
7 going to show you how the evidence may have changed or at least
8 his relation of the accident may have changed. Pat, middle
9 beginning with he then noted loss of consciousness. About five
10 lines down, he then noted loss of consciousness. Now, on the
11 night of the accident, he told the emergency room people he
12 didn't lose consciousness. By the time March 10th rolled
13 around, he added to his doctor that the car was going 50 miles
14 an hour and he lost consciousness. Those two records, ladies
15 and gentlemen, are not consistent. On the night of accident he
16 didn't lose consciousness. Several months later all of a
17 sudden he did.

18 You have to examine and contemplate why his story may
19 have changed. I'm simply pointing out that his story had
20 changed, and I don't even -- it's not an obligation for me at
21 this point to convince you of one side or the other. You can
22 take that down. Thank you. My obligation is to show you that
23 there were reasonable questions about this claim something was
24 not fitting. There is a trial lawyer's trick I will let you in
25 on. It is the secret of switching out quality and quantity.

1 We can all agree that Mr. Pisanchyn has won the case
2 if it is a case about quantity of time, of paper, shelves and
3 shelves of paper. Quantity is intended to make up in your
4 minds for the lack of quality, and the judge has instructed you
5 on the weight of the evidence and the significance of it. I am
6 not going to interfere in that instruction. For all the
7 quantity, for all of the binders, perhaps 30 or 40, you have
8 not seen a piece of paper with a confirmed diagnosis of
9 fracture. You have not seen, for example, any preaccident
10 M.R.I.s or studies or records showing that Mr. Clemens didn't
11 have disk herniations before the accident.

12 You saw evidence that was desiccation. That word was
13 used. I believe it was Mr. Catalano based on his experience
14 adjusting claims three different companies in 30 years, he knew
15 desiccation was a dehydration or degenerative process. Well, I
16 don't know a lot about biomechanics or medicine. But I do know
17 car accidents don't cause degenerative conditions. They cause
18 trauma. You have not seen any evidence that any of those
19 medical records ever said the condition seen, the disk
20 herniations or the compressions were related to a trauma as
21 opposed to a degenerative process.

22 An insurance company is not required to be perfect.
23 An insurance company is required to be reasonable. An
24 insurance company is not required to place Mr. Clemens'
25 interests above its own interests. It can keep Mr. Clemens

1 interests and insurance companies interests on the same level
2 playing field, one that Mr. Pisanchyn advocated for earlier.
3 Honest mistakes are not bad faith. I'm not sure there have
4 been mistakes. But even if there were mistakes, it's not bad
5 faith which brings us to Jim Dvoracek. Jim Dvoracek is a good
6 man. He's a simple man who does his job as a claim adjustor as
7 best he can. He told you especially during the early stages of
8 his testimony that the investigation included requests for
9 information which they did not have.

10 He admitted to you that in a vacuum of which state
11 law applied, he looked into for a brief period during the life
12 of the claim the seat belt defense. He didn't hide it. He
13 owned it. And he said ultimately it was not applicable. It
14 discontinued three years before the claim settled. It
15 certainly was discontinued before the plaintiffs ever agreed to
16 take \$25,000 or ever settled the claim. It was considered, and
17 Mr. Setcavage said the investigation of that particular aspect
18 was discontinued. I told you at the outset of the Mr.
19 Setcavage said the case changed almost daily if I am
20 remembering his testimony correctly.

21 Choice of laws is incredibly hard. I don't envy
22 judges for a lot of reasons. One of the reasons is choice of
23 law. It's very difficult. It's very difficult. I should say
24 I don't envy the judge's job. I am not criticizing the judge
25 at all. I am simply do not envy those intricacies that have to

1 be ruled on. Pat, exhibit 61, the initial disclosures, please.
2 Pages D. 557, 558 and 559. You will recall that during my
3 cross examination in which will forever be known as Mr. Kaster
4 as the time machine question. I asked Mr. Setcavage -- can you
5 pull them up side by side or just go to the second and third
6 pages? You recall that -- at the bottom of page -- thanks,
7 Pat. I appreciate it.

8 We asked for -- in December 2013 you see the date on
9 the bottom right document, December 5th, 2013. We asked for a
10 computation of damages and the disclosure -- second paragraph
11 on the second page, Pat, plaintiffs are not in possession --
12 December of 2013, Mr. Clemens and his lawyers, themselves did
13 not know what their damages were and, therefore, what the claim
14 was worth. And I asked Mr. Setcavage a simple question, which
15 I ask you now, and I ask you to remember when you go back to
16 your jury deliberations. How is it that the plaintiffs expect
17 my client to know the value of an injury in 2011 when they
18 don't know it in 2013? That's not reasonable.

19 It's not fair. Doesn't even make sense. If they
20 don't know -- and by the way still haven't turned over the
21 documents as of that time on the wage -- if they don't know,
22 why are we expected to know? That opinion I would submit to
23 you -- that opinion is an opinion which can only be purchased,
24 and it was and it was given to you. You're entitled to
25 consider any of it, none of it. And the judge did tell you

1 that you're entitled to weigh the credibility of all witnesses
2 certainly including Mr. Setcavage. I admit and concede there
3 are some weird questions in the case such as why -- exhibits 37
4 and 39. Why would Mr. Clemens' lawyers request that we
5 unilaterally schedule the deposition? Why would they ask that
6 when Mr. Setcavage said the industry standard is to swap dates?
7 Referencing exhibit 37 now, Mr. Kaster pointed out and we -- we
8 would prefer -- since you indicated you prefer to unilaterally
9 schedule these events, that substantiates what I said about
10 unilateral scheduling -- he said above that, we prefer your
11 office provided dates to ensure your client's convenience. Why
12 would that happen? Exhibit 305. Why would that happen only
13 for Ms. Albright to cancel the deposition she said we could
14 pick any date? The reason why it happened is that slot machine
15 require coins and that the excuse of our unilaterally
16 scheduling a deposition or examination under oath is worth more
17 to Mr. Pisanchyn in this courtroom than had he simply brought
18 his client to Scranton to complete the examination under oath.

19 It's an odd, odd request to say take any date you
20 want and then cancel it. This is important. The excuse of
21 trying to claim that we unilaterally scheduled the deposition
22 is worth more to Mr. Pisanchyn than actually simply getting the
23 examination under oath completed. It is what is required to be
24 put into the machine before the handle is pulled. The excuse.
25 I'm going to exhibit 63. Pat, please call up the wage

1 transcript.

2 Late in the day -- or late in the case today, Mr.
3 Pisanchyn attempted to make some hay with respect to, why did
4 you ask for joint tax returns. I don't know how many of you
5 are married. But married couples file tax returns jointly.
6 It's permitted by the I. R. S. If the Clemens filed jointly,
7 then the only place there would be for income information would
8 be the joint tax return. There is also, however, consistent
9 with the judge's order -- and I agree that Mr. Pisanchyn was
10 not required to turn over joint tax returns. There is,
11 however, an Internal Revenue Service wage and income
12 transcript.

13 I'm not going through every page of that. I simply
14 want to say -- you will have access to it if you wish -- we
15 finally got ten years of worth earnings history so we can take
16 a look at the loss of earnings claim on June 16, 2014. The
17 case was settled four days later. Why did Mr. Pisanchyn never
18 take a position on the seat belt defense? These weren't
19 qualified to take a position on the seat belt defense than Jim
20 Dvoracek. Why would he never take the position on that? Why
21 wouldn't he say, I disagree that the seat belt defense applies,
22 I think you are applying the wrong law? Why would he not
23 simply state his position? Because slot machine require coins.
24 And the excuse that this good, simple man, this claims adjustor
25 applied the wrong law is far more valuable to Mr. Pisanchyn

1 than him simply saying, I disagree with you, Pennsylvania law
2 applies. Another chance to pull on the handle.

3 Mr. Pisanchyn showed you the jury instruction about
4 false in one, false in all which means if you don't believe a
5 witness is telling you the truth on one item, you're free to
6 consider the entirety of his testimony is not worthy of belief.
7 It may have seemed a strange question to you when the first
8 question I asked Mr. Setcavage was, you heard of the saying you
9 can't be trusted in small things, you can't be trusted in big
10 ones? That's essentially a rip off of the false in one, false
11 in all jury instruction. Mr. Setcavage came in here, sat
12 himself down and without any basis at all told you that he
13 thought he had more continuing legal education than any lawyer
14 in this courtroom. How believable is that? How little regard
15 does this man have for your intelligence to sit up there and
16 presume?

17 I want to show you two small pieces of Mr.
18 Setcavage's deposition testimony. Pat -- I believe these two
19 small snippets, although you are to consider his whole
20 testimony, of course, are very important about his approach to
21 this case. Pat, page 40 of my cross examination, lines 12
22 through 16. Question, do you know why it took a United States
23 federal district judge to order Mr. Pisanchyn to turn over ten
24 years of wage history instead of him simply just turning it
25 over to help his claim. Answer, excuse me, no, that was not

1 part of my analysis then. Next page, Pat, 41, lines 2 through
2 9. Are you aware that Mr. Pisanchyn and his office did not
3 provide a ten year wage history so that New York Central could
4 not do an analysis of his loss of earning capacity claim until
5 June 16, 2014. Answer, that was really not part of my
6 analysis, no. The 30 thousand, maybe 50 thousand bucks, that
7 wasn't part of your analysis. And Mr. Setcavage was very clear
8 in pointing out it was 32,000 and I am paid up until I am done
9 here today. It's easy I supposed to come with opinions when
10 you can pick and choose those facts that you want to consider
11 and those facts which you don't. I suppose if you overlook the
12 fact that my beard is gray and my face is a little tired, an
13 expert can say I'm 16. It's all matter of how much you're able
14 to ignore and tolerate. It's all a matter of what you will do
15 for 32 grand. You're entitled to consider that.

16 I submit to you that in this case, Mr. Setcavage was
17 not the only expert to testify. He was the only legally
18 qualified expert. But witnesses, lay witnesses are entitled to
19 talk about things they know. And if you don't know anything
20 else about Joe Catalano, you know that that man knows about
21 insurance. Thirty years experience, three separate companies,
22 not one like Mr. Setcavage, 30 years' experience, three
23 companies, big and small. You're entitled to weigh Mr.
24 Setcavage's testimony any way you wish. You are entitled to
25 weigh Mr. Catalano's testimony any way you wish. It's a matter

1 of who you find more believable, who you find more honest,
2 trustworthy, credible. A very quick note about burden of proof
3 in this case. The judge talked to you about clear and
4 convincing evidence. He told you that the clear and convincing
5 burden of proof is a burden of proof where you find that the
6 evidence is so direct, substantial and weighty that without
7 hesitation -- without any hesitation you find that my client
8 committed bad faith with respect to the handling of this
9 insurance claim.

10 Can any of you honestly say that there's not large
11 amounts of hesitation about whether or not my client acted in
12 good faith or bad faith? My client made every attempt to get
13 any information. If you have any hesitation about that, the
14 instructions tell you to find for my client. I suggest to you
15 there's almost no evidence of bad faith in this case other than
16 what Mr. Setcavage was paid to deliver. You saw the documents.
17 You saw what actually happened. I don't enjoy writing letters.
18 There's a reason those letters were written. Those letters
19 were written so that in the inevitable day when Mr. Pisanchyn
20 decides to try to ring the bell and make the lights go off on
21 the slot machine we have something to show you. Halloween was
22 last week.

23 Mr. Pisanchyn presented you with several ghosts. I
24 am just going to discuss them briefly. I discussed seat belt
25 issue. I am not go over that again. I have another question

1 about the authorizations. If it was so onerous for Mr.
2 Pisanchyn to provide his own authorizations, why haven't you
3 seen a letter from Mr. Pisanchyn to the insurance company
4 saying, hey, I don't want to do my own forms, send me your
5 forms, or hey, I don't want to go through the pain on the back
6 side of doing those forms? Why wouldn't he just say that? And
7 the reason why he wouldn't say that is because the slot machine
8 requires coins. He needs the excuse that you didn't send me
9 the authorizations far more than he would be able to come in
10 here and say, well, they didn't send them, I followed up and
11 asked them to send them. The excuse is far more valuable to
12 Mr. Pisanchyn than had he actually tried to work it out or send
13 his own authorizations which Mr. Setcavage said can be found on
14 legalzoom.com and certainly any law office.

15 Mr. Setcavage talked about written guidelines. I
16 wish to tell you that proving of bad faith requires so much
17 more than not following a regulation, not following a guideline
18 or a written procedure. That's not bad faith. Bad faith
19 requires much more recklessness, indifference. Failure to
20 follow a procedure is not bad faith. Mr. Catalano told you,
21 and Mr. Setcavage failed to show you -- Mr. Catalano told you
22 that -- Mr. Kaster asked, where can I do, where is the book
23 where all the insurance industry standards and practices are?
24 There is no book. And Mr. Dvoracek with all his honesty and
25 simplicity -- wasn't his first year. He had been with the

1 company for ten years, I believe.

2 Ladies and gentlemen, have you seen a single piece of
3 evidence in this case indicating that New York Central Mutual
4 pays bonuses based on how little the claims department pays
5 out? Have you seen a single piece of paper? Has that
6 accusation ever become anything more than an accusation in Mr.
7 Pisanchyn's mind? What has he shown you? His case consisted
8 of four people from New York Central Mutual, all honest
9 believable people and a paid expert. They all told you our
10 bonuses are not tied to what we pay out in claims. Secretaries
11 get bonuses. Custodial staff gets bonuses. The C. E. O.'s
12 percentage of the bonus is the same percentage as the custodial
13 staff bonuses and it's not tied to claim results. Mr. Pylinski
14 testified very honestly I submit that that's not how the
15 bonuses work at New York Central. When asked about incentives,
16 which is different than bonus, Mr. Pylinski said, our company
17 pays incentives for health and wellness. That's an incentive.

18 You didn't hear one witness, see one piece of paper
19 that said New York Central Mutual, a company that's been in
20 business for a hundred plus years pays its claim staff based on
21 how little they pay out. An insurance company who did that
22 would not be in business for a hundred plus years. Now, Mr.
23 Pisanchyn knows that his case on bonuses is weak. He has
24 trotted out the snow in the morning versus the snow in the
25 evening. I will concede, Mr. Pisanchyn, that if I go to bed

1 and there's no snow on the ground at night and I wake up and
2 there's snow on the ground in the morning, I look and see that
3 it has snowed overnight if Mr. Pisanchyn will concede that if I
4 get up in the morning and Mr. Pisanchyn is standing on a brown
5 lawn telling me it snowed, that is not circumstantial proof.
6 There is no snow here. Mr. Pisanchyn is standing on the ground
7 telling you there's snow. That's not circumstantial evidence.
8 That's no evidence. The most candid and believable thing Mr.
9 Pisanchyn said he said a few moments ago, he said -- with
10 respect to the arbitration, we could have done it the right
11 way. We could have. Ms. Albright could have. If you've been
12 listening, you know the next question I'm going to be asking
13 you. Why -- if they knew they could have made an arbitration
14 demand the right way, why didn't they? Because coins are
15 required for slot machines. And because the excuse that an
16 arbitration did not take place in this case is worth far more
17 to Mr. Pisanchyn than had he simply done something the right
18 way, a way in which he said they could have done it right. He
19 said that. I made a note. The excuse of not going to
20 arbitration is another chance of pulling the lever.

21 Who took advantage of who in this case, ladies and
22 gentlemen? A man gets paid \$25,000, misses three days of work.
23 He's not satisfied with that. He drags a small mutual
24 insurance company into court. Who is taking advantage of who?
25 Who is being put through the ringer now? After watching the

1 case put on by Mr. Pisanchyn, is it a mystery to anyone has to
2 how New York Central Mutual was required to pay \$17,000 to
3 defend itself? If you look over at that shelf of binders, you
4 can see why New York Central Mutual was forced to spend \$17,000
5 on lawyers to defend itself. They are still --

6 MR. PISANCHYN: Your Honor, that's -- I will object,
7 and I will ask --

8 THE COURT: I don't remember any evidence whatsoever
9 about cost of lawyers and -- hold on. Only one of us can speak
10 at a time. You made your objection. I sustain the objection.
11 It's stricken from the record. You are not to consider it.
12 There's no evidence related to it.

13 MR. HADDICK: I do apologize. I thought there was
14 testimony about legal fees required to be paid by my client.
15 Mr. Pisanchyn has another opportunity to get up and speak with
16 you. That's a good thing because I will place in your minds
17 some questions to ask yourself while you listen to him talk for
18 the final time in this case. Why has he pled for his client's
19 day in court only to leave them sitting over there and not for
20 a minute putting them over there? He's right. This was their
21 day in court. They didn't show, and they didn't talk to you.
22 They didn't tell you a thing.

23 Mr. Pisanchyn cannot testify in their place. Why
24 were there inconsistent injury descriptions given in the claims
25 forms? Why withhold wage history for ten months after the bad

1 faith suit was filed? Does anybody know why they would do
2 something like that? Slot machines need coins. Had he turned
3 the wage information over, the case could have settled earlier
4 and he wouldn't have been able to come into court claiming bad
5 faith. Perhaps he should answer that for you. Why did the
6 plaintiff obstruct and delay for three years providing simple
7 wage information and come into this courtroom and try to tell
8 you it was New York Central Mutual's fault? Ask that question
9 in your mind. Discuss it if you wish. Mr. Clemens are not the
10 only people that will have to live with what decision is going
11 to be made in this case. This afternoon or this evening or
12 tomorrow, Joe Catalano has a two hour drive back home. What
13 you say about how he did his job is important to him. He will
14 have to live with your decision.

15 You -- each of you will wake up tomorrow morning
16 perhaps relieved it's all over, and you will have to live with
17 the decision you make. One of the reasons we have large
18 windows in courtrooms is to remind us of something. It reminds
19 us that the sunshine should be let into this place and that you
20 should be shown any evidence either party wants to submit in
21 support of their case. Ask yourself who has shown more. I was
22 candidly -- I don't know how to put this. I was candidly sad
23 perhaps that this case got this far.

24 But then I heard Judge Mannion on Monday say
25 something, and I want to read it because it changed the way I

1 felt about why we were here. Judge Mannion said, jury service
2 is the highest form of duty an American citizen can perform
3 outside of defending your country in a time of war. When he
4 said that, I thought there's no better place for this case than
5 this courtroom because now you have the power. The United
6 States federal courthouse and in this courtroom he courtroom
7 are not slot machines. This place means something. Your job
8 that you're going to do in a few moments means something. What
9 New York Central did, how it acted was reasonable. Perhaps it
10 might be more appropriate for this jury to tell Mike Pisanchyn
11 to change the way he acts. Thank you.

12 THE COURT: Mr. Pisanchyn.

13 MR. PISANCHYN: Your Honor, I can go but does the --

14 THE COURT: Go, please. All right.

15 MR. PISANCHYN: Mr. Haddick and Mr. Kaster are good
16 men, especially Mr. Haddick.

17 MR. HADDICK: Your Honor, he's hovering.

18 THE COURT: He can stand anywhere he wants in the
19 courtroom. Okay. Go ahead.

20 MR. HADDICK: Mr. Haddick is a good person. He and I
21 are both attorneys, and we're cordial to each other. The
22 question I have is why has he mentioned my name over 40 times
23 during his summation when it's not my case? Who is making him
24 do this knowing he's a good person? What person? What entity?
25 What company is forcing the person like Mr. Haddick to mention

1 Mr. Pisanchyn's name, my name, over 40 times? Mr. Haddick has
2 the audacity to accuse Mr. and Mrs. Clemens to wait five years
3 to pull a slot machine handle? Is that what he just said on
4 the record? Is that what he just said? Are you kidding me?
5 That's what his argument is on a record that Mr. Clemens and
6 Mrs. Clemens' children will read? That's what he just accused
7 them of? That's what he just accused them of. I don't have a
8 case. Look at the caption. I never had a case. I never had a
9 case here. I never even was involved in this case.

10 I handle bigger cases, cases that change industries,
11 and that's why I am here. That's why I decided to take the
12 case. The correspondence came from Ms. Albright and Mr. Figure
13 in my office. I take cases that change industries, and this
14 industry needs to be changed. This is disgusting. It is
15 disgusting this long we had to wait three years if not longer
16 the Clemens had to wait to get paid when adjustor Dvoracek said
17 he would have paid it in 2011. That's disgusting. Mr.
18 Pisanchyn, Mr. Pisanchyn, Mr. Pisanchyn has enough tokens to
19 put in any slot machine. It's not about me. You know what?
20 It's not even about Mr. Clemens. It's about NYCM insurance.
21 That's what this case is about, their actions.

22 And that's what they are trying to do is blame
23 everyone else but themselves, and it's ridiculous. The Clemens
24 are heros. They had to get through and put through questioning
25 and depositions that were the most insulting things I ever

1 heard about lying and adultery and things of that nature.

2 MR. HADDICK: Your Honor --

3 THE COURT: That's stricken from the record. There's
4 no evidence about that in the case. That's been discussed
5 before. Don't consider anything related to that statement.
6 Let's try to stay on focus and what the evidence is, please,
7 from everybody's side.

8 MR. PISANCHYN: It's my understanding NYCM insurance
9 brings up the timeline. Didn't seem scary when I saw it,
10 especially when all those things were coming down. The dots
11 were pretty neat. We have these. We have addressed these.
12 You will have the documents back there. If you want to go
13 through them and look, please. I don't like hiding anything
14 from people. This timeline when I saw it in opening was the
15 most ridiculous thing I ever seen ever because how you only put
16 your position in front of a jury? How do you do that and have
17 credibility? That's the only thing I ask. How do you just put
18 your dots and not everyone else's dots? Is that fair? Is that
19 -- is this a fair representation of the evidence you heard? Is
20 it? You will have to decide. Is this fair though ?

21 Maybe it is. Maybe according to Mr. Pisanchyn it is.
22 In regard to the letters that we sent on there, they are back
23 there on the system. I don't know how to show you them. Look
24 at them. NYCM insurance -- NYCM insurance subpoenaed my
25 clients to be here. They had to sit through this whole trial

1 instead of going to other places. Then he says I didn't call
2 them. I didn't call them? NYCM insurance could have called
3 them any time they chose. They subpoenaed them from Monday
4 through Friday. That's why they have been sitting here not as
5 a spectacle, not because they wanted to. They subpoenaed them.

6 They could have called them any time they wanted, any
7 time. Then they are going to say we didn't call them. Why?
8 So they have the paddy wagon again? Is that what they wanted?
9 If they wanted to put them through the paddy wagon, he could
10 have called them. He's going to tell me I didn't call them.
11 That's fair? That's fair? Sounds fair? In regard to
12 organizational charts, yeah, I did raise a fact about that
13 because if you look into the organizational charts the
14 reasonable inference you will see is the Robinsons owned four
15 companies underneath, and so the small little mutual company --
16 do you remember -- little bump on the nose -- then we have a
17 small mutual company that's worth over a billion dollars,
18 small, that's small, itsy bitsy, tiny little baby mutual
19 company that's worth a billion dollars, poor them -- I
20 understand. That's Mr. Pisanchyn saying it. That will be up
21 to you.

22 You heard about Mr. -- NYCM talks about NYCM's credit
23 rating. You heard from Pylinski how important that was. You
24 heard during this period of time when they were adjusting the
25 claims they had two major storms. The issue is during that

1 period of time they weren't making money. So when you are not
2 making money as an insurance company, you have to sustain
3 yourself. How do you do that? I asked Mr. Pylinski how you do
4 that. If you recall I asked him how insurance companies make
5 \$32 million a year. What he told me was they set premiums.
6 That's set. They have adjusting -- adjustment expenses that go
7 out. That's set. They have expenses that is set just like any
8 other company.

9 So there's only one variable in this equation, is
10 there not? We know this is set. We have to pay the adjustor.
11 Catalano gets paid no matter what as well as everybody else. I
12 am not saying he shouldn't. He earns his money just the same
13 as anyone that works, okay. I am not saying he shouldn't get
14 it. But it's set. The expenses are set. So what's the factor
15 that goes into profit? The bottom line. What's the only thing
16 that a company can change? And why is it that the number three
17 guy in the billion dollar company is having meetings with the
18 vice president who is Mr. Catalano's supervisor -- or maybe not
19 -- I am not sure -- but calls down to the adjustors. Am I
20 standing on a red carpet or standing in snow? I don't know.
21 All I can tell you is that in a billion dollar company I never
22 heard of the number three guy talking to the guy way down in
23 claims to tell them to talk to their adjustors. And I never
24 heard of somebody like Mr. Catalano's supervisor every month
25 reviewing settlements. Remember adjustor Dvoracek said we

1 review settlements to see how much I pay, if I don't pay -- if
2 I pay too much, I might get into a little trouble. Sixteen
3 requests, two requests for exams. I have been hearing this for
4 five years. Five years I've been hearing this stuff. You have
5 the timeline. Go through it. You'll see five years this is
6 the same dance, same dance. Setcavage's opinion is bought. I
7 don't care if you probably -- whatever -- look at the documents
8 he has to go through to review.

9 And Ms. Albright in my office is creating all those
10 documents to pull a slot machine? I hope not. If that's the
11 case, we have a little bit more things better to be doing in my
12 office -- I can assure you of that -- than to not get our
13 clients paid. So we have -- according to NYCM insurance we
14 have this thing mapped out from the beginning. That's what we
15 wanted to do. The plaintiffs wanted to -- let's hope they
16 don't give us the money, let's hope, and then we will get in
17 front of a jury and maybe get a chance, maybe we will get a
18 chance. But the thing that I don't get is that he's still
19 referring to Mr. Clemens' injuries as a nasal contusion. He
20 said that in the opening, and I thought -- I did everything I
21 could put to just jump, but I didn't.

22 Then I figured, okay, he must have caught his mistake
23 when we were going through all this stuff. During closing he
24 again tells you that there was a nasal contusion, that's it. I
25 don't know if I'm dreaming. I'm not sure. But I can swear I

1 showed -- I think he was in the courtroom -- maybe I'm wrong.
2 But I thought I show this exhibit. It's marked 6 A. Now, does
3 Mr. Clemens, a regular person -- does he get to rely upon what
4 his doctor is telling him, or does he say, no, Doc, you're
5 crazy, you're crazy? Is that what Mr. Clemens gets to do? If
6 someone told you you had this, would you believe your doctor?
7 You have the right to believe your doctor. I would hope so.

8 Then in regard to the M.R.I.s, the M.R.I.s -- this
9 will be in JERS as 6 H. and 6 E. The M.R.I. show there is
10 herniated discs. They have this information, okay. Now,
11 here's the thing. It's funny how predictable an insurance
12 company that doesn't do the right thing is. Mr. Haddick
13 immediately started talking immediately about to you when we
14 mentioned herniations -- what was the word he used? Starts
15 with a D., degeneration. Now, isn't it funny how I asked
16 adjustor Dvoracek, when you hear the word generation, what's
17 the first thing you tell every attorney? What's the first
18 thing you tell them? How were you trained? Oh, no, nobody
19 trained me. Joe played the clip. Yeah, he was trained. He
20 was trained by NYCM insurance -- this gentleman here, the guy
21 that's watching over Mr. Haddick and Mr. Kaster the whole trial
22 making sure he continually says Mr. Pisanchyn, Mr. Pisanchyn,
23 Mr. Pisanchyn, okay. Mr. Pisanchyn, Joe, right there -- you
24 see him -- he's been looking at him the whole time, okay.

25 \$28,000 for a nasal contusion. \$28,000 worth of

1 medical bills, little itsy bitsy contusion? They showed you
2 X-rays -- even in closing -- it's just, like, I don't have a
3 pen, I don't have a pen. They show you in closing an X-ray of
4 a nose and then say that Mr. Clemens didn't have a broken neck
5 at the emergency room. I don't have a pen. Yeah, you have
6 taken an X-ray of the nose. It doesn't show if you have a
7 broken neck, okay. It doesn't show if you have a broken neck.

8 I can tell you the documents where there was a test
9 according to Mr. Clemens' doctors say findings consistent with
10 a recent fracture as noted. It also says due to trauma.
11 Haddick and NYCM insurance -- I shouldn't refer to him because
12 he's only doing his job, Mr. Haddick. NYCM insurance says that
13 Mr. Clemens' story changed. That's where you talk to me about
14 misrepresentation. Where I come from when I say misrepresent,
15 you know what I am telling you? You're a damn liar. That's
16 what it means, okay. That's where I come from. Somebody --
17 drinking at a bar and says you're misrepresenting, what they
18 are telling you is you're a damn liar. He said it again today.
19 His story is changing. The important part though is where is
20 this in the insurance adjustor 's notes? Talking about red
21 flags. Adjustor Dvoracek doesn't know what a red flag is.

22 Are they Monday morning quarterbacking you to death
23 or not? I feel they are, but that's me. That's not you.
24 You'll have to decide that for yourself. Can we put up --
25 level the playing field. We live in a civilized society which

1 solves disputes in a civilized manner. We don't call attorneys
2 names. We don't call other attorneys. We talk about clients.
3 It a client's case. It has nothing to do with me. We cannot
4 always play -- level the playing field on our playgrounds. But
5 we must level the playing field in our courts. The reality is
6 the Court may be the only place where such rules that guarantee
7 a level playing field are strictly enforced. The only place
8 because of this. This is why we have courts. This is why we
9 have jurors.

10 This is why there's not eight attorneys sitting up
11 there that might know me or might know Mr. Haddick that might
12 say, maybe we will give it to Pisanchyn, we like him better.
13 You don't know the parties. This is a level playing field.
14 The seat belt they say wasn't considered -- do you have the
15 next clip? They said the seat belt wasn't considered. Why is
16 that in the notes? Again, five years later I know what they
17 are going to say. I know that. Where is it in the notes that
18 the seat belt defense was discontinued?

19 I know they couldn't find any evidence he was wearing
20 a seat belt based on their investigators. The medical records
21 said it. We saw that. The issue is, is that they didn't --
22 never discontinued the defense even at the time of the
23 deposition. They were still raising that New York law has a
24 seat belt defense. Pennsylvania law does not. Pennsylvania
25 law does not have a seat belt defense. You cannot bring that

1 into court. You cannot bring into court in a civil case
2 whether or not someone was wearing a seat belt. They didn't
3 know that until I went up to New York and told them. That's
4 why they were paying less on this claim. That's why they were
5 paying less on this claim because of the comparative negligence
6 issue.

7 They say choice of law could be difficult. For a
8 billion dollar company I don't know how much can be difficult.
9 They could have hired an attorney. They did talk to an
10 attorney. The attorney told them it was Pennsylvania, but they
11 didn't like that because it wasn't favorable to them. So they
12 didn't follow it. Is that the rules of the game? Is that the
13 rules of the game? Is that dangerous? Is that dangerous for
14 every insurance company to follow? Punitive damages are
15 something -- the only type of justice available to deter
16 powerful entities from using their position of strength to
17 defeat the lesser party, the lesser party only because that
18 party cannot compete on the same level as the giant.

19 It is the epitome of leveling the unbalanced playing
20 field. This is why -- this is why your verdict is going to
21 matter. That's why it is because eight people from all over
22 the middle district are going to come to a decision that is
23 going to make sure this industry -- the insurance industry
24 knows how to treat their insureds. They talk about lost
25 earnings. They say he only lost three days but he needed lost

1 earnings for four. He missed three days of work, but five
2 years they are still waiting for the wage report. Which is it?
3 If you go back for wage reports, the wage report will tell you
4 he did lose \$12,000. I don't want to quote a specific figure.
5 The year after -- everything is consistent until a year after
6 this collision, okay. So when you are back there, look at
7 that. If they reserve that at 25 and settled it four years
8 after that, then you think they would have at least added that
9 money on there, right. They only always said that the limits
10 are 35 and the dec page is 50. So why are they telling their
11 insured the policy limits are 35 when their dec page says it's
12 50?

13 He said the C.O.O. makes the same amount of money
14 that the NYCM C. E. O. makes. I can swear when I asked him he
15 said he makes up to 40 percent and sometimes 50 percent. That
16 was his bonus. The line guys get two to ten. So I don't know
17 -- maybe I fell asleep and dreamt. I am not sure. It's just
18 my version of the testimony. Yours is what counts. Your
19 Honor, can I approach for one second in regard to this issue
20 here?

21 (The following discussion took place at sidebar:)

22 MR. PISANCHYN: He said they were paid \$17,000. They
23 were paid over \$300,000 --

24 THE COURT: No, I struck that from the record.

25 MR. PISANCHYN: Doesn't help him.

1 THE COURT: I said there was no -- no discussion of
2 that by any side. I struck that from the jury's mind.

3 MR. HADDICK: One thing he mentioned -- I believe the
4 legal bills, SUM claim for \$17,000. I am putting my --

5 MR. PISANCHYN: You kept saying for this case, in
6 other words this case, it was 17 which this was 300 --

7 (The discussion at sidebar concluded.)

8 MR. PISANCHYN: Hello, I see here, what happened the
9 jury -- the jury sent a message? Oh, what did they say? What?
10 What? That means we have to change the way we do business?
11 Oh, lord, all right. Well, I will call Joe Catalano, call Ms.
12 Wildey, we will make sure that we immediately start doing
13 things differently and paying our insureds the amount of money
14 they deserve.

15 Ladies and gentlemen, I have lived with the Clemens
16 case and Mr. and Mrs. Clemens for years, and I am really scared
17 to turn it over to you. Maybe that's why my presentation was
18 so long. But right now I really do believe that you have
19 enough evidence.

20 I believe you know the ratio in regard to one percent
21 equals one percent, and what I would ask you do is send a
22 message to NYCM so they can hear all the way out in New York to
23 make sure that they stop messing with their insurance. Thank
24 you.

25 THE COURT: Thank you, Mr. Pisanchyn. All right,

1 ladies and gentlemen. Here's your closing instructions. Your
2 first duty, members of the jury, is to select among yourselves
3 a foreperson.

4 Now, the foreperson will be charged with
5 administering your deliberations. It is important to
6 understand that the foreperson has no more authority or power
7 than any other juror in the case. The vote of foreperson is
8 equal to any other person in the case. If during the course of
9 your deliberations you need to communicate with us, you will do
10 so in writing. It should be in the form of a question reduced
11 to writing and signed by the foreperson.

12 Place the written question in an envelope which are
13 inside the jury room. Hand it to the court officer who will be
14 out here in the courtroom. They'll bring it to me. I'll
15 discuss it with counsel, and we will either send back a written
16 response, or if necessary we will bring you in courtroom to
17 give a response to that question. In any questions or
18 communications you have with the Court, the jury should never
19 indicate how it stands numerically on any of the issues which
20 have been submitted for your determination.

21 Now, I had Barbie forward down Court Exhibit No. 2.
22 That's the verdict slip. You're to answer the questions in
23 order. Answer the first question first, and after you answered
24 it, follow the instructions below that to see whether you
25 answer the second or sign and come in. Once you've answered

1 all the questions that need to be answered in the case, the
2 jury foreman will sign it, date it, put it in an envelope,
3 knock on the door, tell the Court officer that you have come to
4 a verdict.

5 They will advise us of that. We will bring you back
6 in order for you to give us your verdict. Now, your verdict
7 must be unanimous as to each of the questions that are
8 presented on the jury form. Once you have reached a unanimous
9 verdict and your verdict slip has been signed by the foreperson
10 -- as I said, you are to place it in an envelope, knock on the
11 door, and then we will bring you back to return your verdict.

12 I made the mistake of assuming we'd be done an hour
13 ago. So your lunch has been sitting in there for about an
14 hour, all right. So with that being said, when you leave now
15 to deliberate. You may, in fact, and should discuss the case
16 among yourselves. One final matter, all the exhibits are on
17 the system called JERS. It's that large T.V. screen. Right
18 next to it there's a touch screen. When you go in there, on
19 the touch screen on the bottom right-hand side, it says menu of
20 exhibits. Push that. The touch screen is all you need to do.

21 Touch that touch screen. It will bring up on a large
22 screen and on the touch screen whatever the exhibits are. If
23 you want to see an exhibit, you just touch it on the screen.
24 It will come up, and you can scroll on the screen just like you
25 would with anything else. The only difference is you're used

1 to scrolling on a computer or Ipad -- you need a much firmer
2 touch on that control panel. You have to push it hard to make
3 it scroll up and down. If you finish with the exhibit, you can
4 see -- you will see on the bottom there's a menu, close the
5 exhibit. You can push the back button to find any other
6 exhibit you want to do.

7 Anything you want, everything that has been admitted
8 is there. It's on that 50-inch screen. You can pull it up and
9 look at anything you want, okay. Thank you very much.

10 (The jury left to deliberate at 1:12. p.m.)

11 THE COURT: We received what -- a note from the jury.
12 It is not signed by the jury foreman or dated as the
13 instructions were given to them. It's actually not a question.
14 It's more of a statement. It says, need elaboration on
15 parameters to charge we're considering. I will show it to
16 counsel.

17 I am going to bring them back in and again describe
18 for them procedurally they are to -- if they have a question, a
19 very specific question in the form of a question, signed by the
20 foreperson and dated unlike what this is. And then secondly, I
21 am going to tell them that if it's a question as to the charge,
22 the law in the case, all I am going to read what I have given
23 them. That's no other explanation. A question beyond that,
24 I'll say -- put it very specifically in the form of a question,
25 date and sign it and then we will review it at that point in

1 time. We will mark this Court Exhibit 3. One is the charge.
2 Two is the verdict slip. Three is the question.

3 (The jury entered the courtroom at this time.)

4 THE COURT: We have a note from the jury. And I need
5 to remind you because we have very particular procedures for
6 our records, if the jury is going to give us a note, it has to
7 be in the form of a question. It has to be signed by the
8 foreperson, and it has to be dated.

9 I got a piece of paper that has a statement on there
10 but really not that. So what we will do in the future is it
11 will be in the form of a question, very specific question
12 signed by the foreperson and dated. Now, I have already read
13 this to counsel. It reads, need elaboration on parameters to
14 charge we are considering. I am not sure I know what that
15 means. I will tell you this that if it's a question concerning
16 the law as I have given you, all I would be doing is rereading
17 you exactly what I have given you.

18 So there wouldn't be anything additional in that
19 regard. The law is the law as it has been given to you, and
20 you have a copy of that charge. So I would be rereading that
21 to you. If there's a more specific question that you have when
22 you say need elaboration, I don't know on what. If there's a
23 more specific question, you can ask that question, and I can
24 figure out whether we can answer it. You should understand
25 that once you get the case, there is no other evidence or

1 testimony or anything that occurs in the case. You've heard it
2 all, and so we don't offer anything other than what is there.
3 The law is what has been given to you. All of that being said,
4 we will let you go back. You can mull over that a bit. And
5 then if you have any further questions -- as I said, they
6 should be very specific and written in the form of a question
7 so we can give a dispositive answer if we can, date it and
8 signed by the foreperson, okay. Thank you.

9 (The jury left to continue to deliberate at this
10 time.)

11 (The following verdict was reached by the jury:)

12 THE CLERK: Ladies and gentlemen, have you reached a
13 verdict?

14 THE JURY: Yes, we have.

15 THE CLERK: United States District Court in the
16 Middle District of Pennsylvania, Bernie Clemens versus New York
17 Central Mutual Fire Insurance Company, civil action No.
18 3:13-2447. Has the plaintiff established by clear and
19 convincing evidence that the defendant acted in bad faith in
20 the handling of his uninsured motorist claim. The answer is
21 yes. If yes, please proceed to two. Please state the amount
22 of damages you award the plaintiff Bernie Clemens, \$100,000.
23 It's signed by the jury foreperson, and it's dated today. Is
24 this your verdict so say you all?

25 THE JURY: Yes.

1 THE COURT: We appreciate your time. It took a week,
2 certainly not unreasonable. What I will do is when you go back
3 please leave all your notes and whatever you have there. We
4 will shred all of that material. And then I will see you back
5 in my chambers to have some conversation with you about what
6 things we can do better for you in the future. All right. See
7 you in a few minutes. Thank you very much.

REPORTER'S CERTIFICATE

I, LAURA BOYANOWSKI, Official Court Reporter for the United States District Court for the Middle District of Pennsylvania, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the within-mentioned proceedings had in the above-mentioned and numbered cause on the date or dates hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my supervision.

Laura Boyanowski, RMR, CRR
Official Court Reporter

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